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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER VARGAS,

Defendant and Appellant.

C070027

(Super. Ct. No. 11F02198)

A jury found defendant Christopher Vargas guilty of committing a lewd act upon his 11-year-old stepson J.D. (count one) and upon his 12-year-old stepson G.D. (count two). (Pen. Code, § 288, subd. (a).)¹ The trial court sentenced defendant to an aggregate term of eight years in state prison, consisting of the middle term of six years on count one, and a consecutive two years on count two.

Defendant appeals, contending his trial counsel was ineffective in failing to request a jury instruction on the defense of accident with respect to count two because there was substantial evidence he touched G.D.'s penis while they both were sleeping.

¹ Further undesignated statutory references are to the Penal Code.

He also asserts the trial court abused its discretion by relying on circumstances in aggravation that were not supported in the record to justify imposition of the middle term on count one. To the extent he was required to object to the trial court's reliance on such factors to preserve the issue on appeal, defendant asserts he was denied his right to effective assistance of counsel.

We shall conclude there is no evidence to support an instruction on the defense of accident, and in any event, defendant was not prejudiced by counsel's failure to request such an instruction because the jury was properly instructed on the issue that would have been presented by such an instruction. We shall further conclude defendant forfeited his claim of sentencing error by failing to object below, and even assuming his trial counsel was ineffective in failing to object, remand is unnecessary because it is not reasonably likely the trial court would have imposed the lower term had counsel raised a timely objection. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Prosecution

In March 2011, defendant lived with his wife and her three children. On March 23, 2011, 11-year-old J.D. went to sleep at approximately 8:30 p.m. When he woke up later that night, defendant was kneeling next to his bed, and defendant's hand was touching J.D.'s penis over his pajamas. Defendant was moving his hand in a circular motion. When defendant saw J.D. was awake, he put their dog on J.D.'s bed and left the room.

The next morning J.D. told his mother what had happened, and she told him to act like nothing had happened until defendant left for work. After defendant left, J.D.'s mother summoned her other children, told them what J.D. had said about defendant touching him, and asked whether anything like that had ever happened to them. Her daughter A.D. immediately said no, but her then 17-year-old son G.D. said defendant

may have done something similar to him when he was younger. At that point, their mother called the police.

On March 25, 2011, G.D. was questioned by a detective during a Special Assault Forensic Evaluation (SAFE) interview. During that interview, G.D. discussed an incident that occurred in approximately 2005, when he was about 12 years old and his mother was dating defendant. He and defendant were watching television in J.D.'s room. G.D. was lying on J.D.'s bed, and defendant was sitting in a chair next to the bed. G.D. fell asleep, and when he woke up a little while later, defendant's hand was inside G.D.'s boxer shorts, touching his penis. Defendant was moving his hand up and down. When G.D. moved a little, defendant removed his hand. About five minutes later, defendant again placed his hand inside G.D.'s boxer shorts and touched G.D.'s penis. At that point, G.D. got up, told defendant, "[Y]ou're sick, leave me alone, I'm telling my mom." G.D. went into his own bedroom, and defendant followed, asking G.D. what was wrong. When G.D. accused defendant of touching his penis, defendant told him he must have been dreaming.

At trial, G.D. told a somewhat different story. He testified he and defendant were watching television in J.D.'s bedroom. G.D. was lying on J.D.'s bed, and defendant was sitting on the edge of the bed. G.D. fell asleep, and when he awoke about an hour later, defendant was laying next to him on the bed. Defendant had his hand on G.D.'s penis, inside his boxer shorts. Defendant's hand may have been moving a little. At that point, G.D. got up and told defendant, "You're sick. I'm going to my bedroom." Defendant woke up, followed J.D. out of the room, and asked him what was wrong. When G.D. accused defendant of touching G.D.'s penis, defendant said something like, "It might have been an accident, but I don't think it happened. It might have been a dream."

When asked about the differences between his statements during the SAFE interview and his testimony at trial, G.D. said he did not accurately portray the incident during the SAFE interview because he was "upset" and "had a lot of thoughts going

through [his] mind.” G.D. also stated, “I don’t believe it was done purposefully to me. I think the night I said it happened to me it was accidentally. I think we were both sleeping, and his hand accidentally . . . fell on me right there in my private area.”

B. The Defense

Defendant did not testify at trial. During closing argument, his trial counsel argued the incident involving J.D. never happened, and that J.D. must have dreamed it. J.D.’s mother (defendant’s wife) testified that a week or so after the alleged incident, J.D. asked her if he would get into trouble if it was just a dream.

With respect to G.D., defendant’s trial counsel argued any touching was not intentional, noting G.D.’s testimony that defendant appeared to have been sleeping at the time the incident occurred, and G.D.’s belief that the touching was accidental.

DISCUSSION

I

Defendant’s Trial Counsel Was Not Ineffective for Failing to Request an Instruction on the Defense of Accident Because There Was No Evidence Defendant Accidentally Touched G.D., and Even If There Was, Defendant Was Not Prejudiced by Counsel’s Failure

Defendant contends he “was denied his right to the effective assistance of counsel under the United States and California Constitutions when his trial attorney failed to request an instruction on the defense of accident” as to count two, which involved G.D. According to defendant, such an instruction was warranted because “there was substantial evidence that [he] touched [G.D.’s] penis by accident while they were both sleeping.” Defendant asserts he was prejudiced by counsel’s failure because “the jury was not told by the trial court that if [defendant] touched [G.D.] by accident, he did not have the requisite criminal intent” We are not persuaded.

To prevail on his ineffective assistance claim, defendant must show both (1) that counsel’s performance fell below a standard of reasonable competence, and (2) that

counsel's shortcomings resulted in prejudice. (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) Defendant has done neither. As we shall explain, there is no evidence to support an instruction on the defense of accident, and even if there was, defendant was not prejudiced by counsel's failure to request such an instruction because the jury was properly instructed on the issue which would have been presented to the jury by the omitted instruction.

Section 26 provides in part:

“All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶]

“Three—Persons who committed the act . . . charged under an ignorance or mistake of fact, which disproves any criminal intent.

“Four—Persons who committed the act charged without being conscious thereof.

“Five—Persons who committed the act . . . charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.”

The defense of accident appears in CALCRIM No. 3404, which explains the defendant is not guilty of the charged offense if he acted “without the intent required for that crime, but acted instead accidentally.”

At trial, defendant, through his counsel, requested that the trial court instruct on the defense of unconsciousness in the language of CALCRIM No. 3425, which reads in pertinent part: “The defendant is not guilty of _____ <insert crime[s]> if (he/she) acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.] [¶] Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] sleepwalking[,]/ or _____ <insert a similar condition>).” The trial court declined defendant's request, concluding there was no substantial evidence to support such an instruction. Defendant does not

appeal that ruling. Rather, he contends his trial counsel was ineffective for not requesting an instruction on the defense of accident because “there was substantial evidence that [defendant] touched [G.D.’s] penis by accident while they were both sleeping.”

Merriam-Webster’s Collegiate Dictionary defines “sleep” as “the natural periodic *suspension of consciousness* during which the powers of the body are restored” (Merriam-Webster’s Collegiate Dict. (11th ed. 2006) p. 1171, col. 2, italics added.) Where the evidence shows the conscious mind of the accused ceased to operate and his actions were “ ‘controlled by the subconscious or subjective mind,’ ” the jury should be instructed as to the legal effect of such unconsciousness. (*People v. Freeman* (1943) 61 Cal.App.2d 110, 118; *People v. Roerman* (1961) 189 Cal.App.2d 150, 161; see *People v. Seden* (1974) 10 Cal.3d 703, 717 [“An unconscious act within the contemplation of the Penal Code is one committed by a person who because of somnambulism [(an abnormal condition of sleep in which motor acts, such as sleepwalking are performed)], a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional”]), overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 165, & disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1083) Indeed, CALCRIM No. 3425 (Unconsciousness) lists “sleepwalking” as possible cause of a defendant’s unconsciousness. Thus, if anything, evidence defendant was sleeping when he reached inside G.D.’s boxer shorts and touched G.D.’s penis gave rise to a defense of unconsciousness, not accident.

As defendant points out, courts have described the affirmative defense of accident as “a claim that the defendant acted without forming the mental state necessary to make his actions a crime.” (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390, disapproved on other ground in *People v. Anderson* (2011) 51 Cal.4th at 998, fn. 3.) While it is true that a person who does an act without being conscious thereof does so “without forming the mental state necessary to make his actions a crime,” it is apparent from section 26 that

the Legislature did not consider acts committed by a person without being conscious thereof to be accidents. Section 26 separately delineates acts committed without being conscious thereof and acts committed through misfortune or accident. Had the Legislature intended that acts committed without the defendant being conscious thereof to be considered accidents, there would be no need to separately delineate a defense of unconsciousness.

In any event, defendant was not prejudiced by trial counsel's failure to request the instruction because the jury was properly instructed that to find defendant guilty of committing a lewd act on a child under 14 it would have to conclude, inter alia, that defendant *willfully* touched G.D.'s penis with the *intent* of arousing himself or G.D. (See *People v. Jones* (1991) 234 Cal.App.3d 1303, 1314, disapproved on other grounds in *People v. Anderson, supra*, 51 Cal.4th at p. 998, fn. 3.) The trial court instructed the jury, pursuant to CALCRIM No. 1110, that to find defendant guilty of the crime of committing a lewd act upon a child, it had to find defendant "willfully touched any part of a child's body . . . [¶] . . . with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child" "Willfully" was properly defined for the jury as meaning "willingly or on purpose."

Given the jury's verdicts, it is clear, beyond credible argument, that the jury necessarily rejected the evidence adduced at trial that would have supported a finding that defendant's accident defense (meant to establish that he acted accidentally, and thus, without the requisite criminal intent, when he slipped his hand inside G.D.'s boxer shorts and touched his penis), thus, implicitly resolving the question of that defense adversely to defendant. (See *People v. Jones, supra*, 234 Cal.App.3d at pp. 1315-1316.)

Consequently, defendant cannot establish he was prejudiced by trial counsel's failure to request an instruction on the defense of accident, and his ineffective assistance claim fails.

II

Defendant Forfeited His Claim of Sentencing Error by Failing to Object Below; and, Even Assuming His Trial Counsel Was Ineffective in Failing to Object Below, Defendant Was Not Prejudiced by Counsel's Failure

Defendant contends “[t]he trial court abused its discretion when it used alleged circumstances in aggravation that were not supported by the record to justify imposition of the middle term of imprisonment” on count one. Acknowledging his failure to object to the court’s reliance on the challenged circumstances below, defendant further asserts that “if an objection was required[,] . . . [he] was denied his right to the effective assistance of counsel.” As we shall explain, defendant forfeited his claim by failing to object below, and even assuming his trial counsel was ineffective, he was not prejudiced by counsel’s failure.

The sentencing options available for a defendant convicted of committing a lewd act upon a child under the age of 14 years are prison terms of three, six, or eight years. (§ 288, subd. (a).) In pronouncing sentence, the trial court is required to “select the term which, in the court’s discretion, best serves the interests of justice.” (§ 1170, subd. (b).) We review the trial court’s sentencing decisions under the deferential abuse of discretion standard. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A trial court abuses its discretion if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for the decision. (*Ibid.*)

As a preliminary matter, we find defendant forfeited his claim by failing to object to the trial court’s reliance on the challenged circumstances in aggravation below. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Assuming for argument’s sake that counsel performed ineffectively at sentencing, remand is unnecessary because defendant has not shown it is reasonably probable the court would have chosen the lower term had counsel raised a timely objection. (See *People v. Anderson, supra*, 25 Cal.4th at p. 569.)

At sentencing, the trial court received into evidence the probation report, the prosecution's statement in aggravation, a letter in aggravation from J.D., and testimony in support from defendant's family and friends. The probation report listed four circumstances in aggravation: the crime involved acts disclosing a high degree of cruelty, viciousness, or callousness; the manner in which the crime was carried out indicates planning; defendant took advantage of a position of trust as the victims' stepfather/mother's boyfriend; and defendant engaged in violent conduct, which indicates a danger to society. Defendant contends there was no evidence the crime involved acts that disclosed a high degree of cruelty, viciousness, or callousness or that he engaged in violent conduct.

In addition to the challenged circumstances, the probation report noted the manner in which the crimes were carried out indicates planning, and defendant took advantage of a position of trust. Defendant does not challenge the trial court's reliance on those circumstances in aggravation, and they are well supported in the record. Defendant waited until the victims were asleep before touching them, which indicates planning, and his position as J.D.'s stepfather and G.D.'s mother's boyfriend shows defendant took advantage of a position of trust. As defendant points out, the report also cites two factors in mitigation; however, the trial court discounted those circumstances at sentencing, stating: "The Court has seen the mitigating facts here that the defendant has no criminal record of conduct, but the Court's sentencing the defendant for a particularly old case in regard to Count One."² The court continued, "defendant has led a generically productive life, and this is his first criminal conviction. But then you look at the aggravating factors

² It appears the court was referring to count 2 as the "old case," but erroneously stated "Count One" because the conduct that forms the basis of count one (J.D.) occurred in 2011, while the conduct that forms the basis of count two (G.D.) occurred in approximately 2005.

. . . . [¶] This is a matter where as to Count One, the appropriate thing is to sentence the defendant to the midterm, which is six years in state prison.” The court also emphasized the circumstance of defendant’s position of trust, stating, “the harm that [defendant’s conduct] does to that family unit is apparent to the Court with the position that one of the victims has taken in front of the Court, in front of the jury, and today at sentencing.”³

On this record, we find it is not reasonably probable the trial court would have imposed a lesser sentence had it known it could not rely on the challenged circumstances. Thus, even assuming defendant’s trial counsel was ineffective in failing to object to the challenged circumstances, defendant was not prejudiced by the error. Accordingly, defendant’s ineffective assistance claim fails.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.

³ At trial, G.D. testified that it appeared defendant was asleep when he touched G.D. and, thus, he believed the touching was accidental. At the sentencing hearing, G.D. said he believed defendant “is most definitely innocent” and that the “whole thing was accidental.”