Filed 11/13/12 P. v. Kinney CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARK LEWIS KINNEY, Defendant and Appellant.	D059454 (Super. Ct. No. SCE296475)

APPEAL from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed as modified.

A jury convicted Mark Lewis Kinney of five counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a));[1] two counts of using a minor to perform prohibited acts (§ 311.4, subd. (c)); and one count of possessing matter depicting a person under 18 in sexual conduct (§ 311.11, subd. (a)). The jury further found that the lewd

1 Unless otherwise indicated, all further statutory references are to the Penal Code.

acts were committed against more than one victim (§ 667.61, subds. (b), (c), (e)). The trial court sentenced Kinney to prison for an indeterminate term of 15 years to life.

Kinney contends the trial court (1) should have instructed the jury on battery as a lesser included offense of committing a lewd act on a child in violation of section 288, subdivision (a); (2) improperly sentenced him under the current version of the "One Strike" law (§ 667.61) for his conviction on the lewd act charged in count 2; (3) should have stayed the sentences on counts 3 and 9 pursuant to section 654; and (4) erred in denying conduct credit pursuant to section 4019 for the indeterminate sentence imposed on count 2. We conclude that Kinney's only meritorious argument is his challenge to the trial court's denial of conduct credit. Accordingly, we direct the trial court to amend the abstract of judgment to reflect conduct credit for the indeterminate sentence on count 2, and in all other respects we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Kinney, who was in his late 40's at the time of trial in 2011, is related to three girls, C., J., and R., whose ages during trial ranged from 11 to 14. Kinney lived near the girls, and he spent a significant amount of time with them throughout their childhood in activities such as watching movies, hiking, swimming and playing music. Often, the girls would spend the night at Kinney's house.

In the summer of 2009, Kinney's sister noticed possibly inappropriate interactions between Kinney and R., who was 10 years old at the time. She reported her suspicions to the parents of C., J. and R. Upon questioning by their parents, C., J. and R. reported

conduct by Kinney that led the parents to make a report of child molestation to law enforcement. In the ensuing investigation, the girls made disclosures to forensic interviewers, and a search of Kinney's computer hard drive revealed approximately 150 images of child pornography, mostly involving prepubescent children.

Kinney was charged with seven counts of committing a lewd act upon a child (§ 288, subd. (a)); two counts of using a minor to perform prohibited acts (§ 311.4, subd. (c)); and — based on the images found on Kinney's computer — one count of possessing matter depicting a person under the age of 18 in sexual conduct (§ 311.11, subd. (a)). C. was identified as the victim of two of the lewd acts and one of the instances of using a minor to perform a prohibited act. R. was identified as the victim of four of the lewd acts and one of the instances of using a minor to perform a prohibited act. J. was identified as the victim of one of the lewd acts.

At trial, C. testified, among other things, that Kinney had shown her pornographic images on his computer; that Kinney had explained sex to her when she was eight or nine years old; that she had seen Kinney's naked body many times; that she and the other girls would go skinny dipping with Kinney; and that they would play a swimming pool game in which two girls and Kinney were all simultaneously in the leg holes of Kinney's swim trunks, during which C. felt Kinney's penis on her back. C. stated that when she was nine or 10 years old, Kinney asked her if she had seen the inside of her vagina and then took a video of C.'s vagina to show it to her. C. also testified that when she was nine or 10 years old, Kinney showed her a movie of Woodstock in which naked people were dancing.

Kinney asked C. if she had pubic hair like the people in the movie, and he then touched her genital area underneath her clothes.

J. testified about skinny dipping and the game in which the girls were inside Kinney's swim trunks. She also described feeling uncomfortable when Kinney would get into bed with her in the morning and cuddle her.

In addition to describing skinny dipping and getting inside Kinney's swim trunks like the other girls, R. described extensive close contact with Kinney. She slept in Kinney's bed several times. He showed her images of naked people on his computer. According to R., Kinney would give her massages, and "probably more than one time" he touched her genital area under her clothes when doing so. R. testified that Kinney touched her "boobs" under her clothes when they were sleeping in a tent, and that he also did so at his house. R. stated that with Kinney's involvement, she used a photocopier at Kinney's house to create a photocopy of her crotch by sitting on the machine. R.'s mother testified that in the pocket of R.'s pants she found photocopied images of R.'s genital area.

The jury found Kinney guilty on each count except for (1) a count alleging a lewd act against C. based on conduct in the swimming pool; and (2) the single count alleging a lewd act against J. The jury also made a true finding that Kinney committed lewd acts against more than one victim, and the trial court sentenced Kinney to an indeterminate prison term of 15 years to life.

II

DISCUSSION

A. *The Trial Court Was Not Required to Instruct on Battery as a Lesser Included Offense of Committing a Lewd Act on a Child*

With respect to the counts charging lewd acts under section 288, subdivision (a), Kinney contends that the trial court erred in not providing a sua sponte jury instruction on battery as a lesser included offense.

As the parties acknowledge, the issue of whether battery is a lesser included offense of committing a lewd act on a child under section 288, subdivision (a) is currently before our Supreme Court (*People v. Gray* (2011) 199 Cal.App.4th 167 (*Gray*), review granted Dec. 14, 2011, S197749; *People v. Shockley* (2010) 190 Cal.App.4th 896, review granted Mar. 16, 2011, S189462), and the intermediate appellate courts are in conflict on that issue (*People v. Santos* (1990) 222 Cal.App.3d 723, 739; *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1291-1293).

However, as we will explain, we need not take a position on whether battery is a lesser included offense of committing a lewd act on a child, because even if it is, the record does not support such an instruction in this case.

Under the statutory elements test, which is applicable here,[2] a lesser offense is included in the greater offense when the statutory elements of the greater offense include

---

[2] Although a second approach exists for determining a lesser included offense based on the facts as alleged in the accusatory pleading, the information in this case used the language of the statute to describe the lewd act counts, and we therefore need apply only the statutory elements test. (See *People v. Licas* (2007) 41 Cal.4th 362, 366.)

all the statutory elements of the lesser offense so that the greater offense cannot be committed without also committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) The existence of "'*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty *only* of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*Ibid*., second italics added.) "When there is no evidence the offense committed was *less* than that charged, the trial court is not required to instruct on the lesser included offense." (*People v. Booker* (2011) 51 Cal.4th 141, 181, italics added.) "'A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] "there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*. [Citations].'" (*People v. Lopez* (1998) 19 Cal.4th 282, 288 (*Lopez*).) Therefore, even if battery is a lesser included offense of committing a lewd act on a child, an instruction based on that theory would be required *only* if substantial evidence in the record would permit a jury to find that Kinney was guilty of committing battery, but *not* guilty of committing one of the lewd acts.

We begin our analysis by reviewing the elements of the offenses at issue. Section 288, subdivision (a) provides that any person who willfully "commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony." "[S]ection 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452 (*Martinez*).) "Any touching of a child under the age of 14 violates this section, even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the intent to arouse or gratify the sexual desires of either the perpetrator or the victim." (*Lopez*, *supra*, 19 Cal.4th at p. 289, italics omitted.)[3]

Battery is defined as "any willful and unlawful use of force or violence upon the person of another." (§ 242.) "'[A]ny *harmful or offensive* touching constitutes an unlawful use of force or violence'" for the purposes of battery. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961, italics added.)

To determine whether the jury could have found that Kinney committed a battery while absolving him of the charge of committing a lewd act in violation of section 288,

---

3 As our Supreme Court has explained, "It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective purposes of section 288." (*Martinez*, *supra*, 11 Cal.4th at p. 450.)

subdivision (a), we must understand the reasoning under which some courts have viewed battery as a lesser included offense of committing a lewd act against a child. The opinion determining that battery is a lesser included offense of a lewd act on a child, which our Supreme Court has under review, reasons that every act of touching a child for a sexual purpose is, by definition, an *offensive* touching that satisfies the definition battery, even if the touching seems innocuous and the child consents. (*Gray*, *supra*, 199 Cal.App.4th at pp. 180-181, review granted Dec. 14, 2011, S197749.)[4]

Kinney's theory for the applicability of battery as a lesser included offense under the facts of this case builds on the view expressed in *Gray* that any sexually motivated touching of a child is an *offensive* touching for the purposes of the battery statute. Kinney argues that because he was accused of touching the girls in this case for a lewd purpose under section 288, subdivision (a), he would also be guilty of the lesser included offense of battery for committing that offensive touching. As we have noted, the trial court would be required to instruct on a lesser included offense if "'"there is evidence which, if accepted by the trier of fact, would absolve [Kinney] from guilt of the greater offense" [citation] but not the lesser. [Citations.]'" (*Lopez*, *supra*, 19 Cal.4th at p. 288,

---

4 The contrary case law, also under review by our Supreme Court, reasons that battery is *not* a lesser included offense of committing a lewd act against a child because a perpetrator of a lewd act may touch a child in a way that is outwardly innocuous and with the child's consent, meaning that the touching is not *harmful or offensive* as required for battery. (*People v. Shockley*, *supra*, 190 Cal.App.4th 896, review granted Mar. 16, 2011, S189462.) Under that analysis, battery therefore is *not* a lesser included offense of committing a lewd act because a perpetrator could commit a lewd act under section 288, subdivision (a) through innocuous touching that would not amount to a battery.

italics omitted.) Assuming for the sake of argument, but not deciding, that battery is a lesser included offense of committing a lewd act against a child, we therefore examine whether there is substantial evidence in the record that Kinney is guilty "*only* of the lesser offense" of battery, but not of committing a lewd act against a child. (*Breverman*, *supra*, 19 Cal.4th at p. 162, italics added.)

Kinney was found guilty of committing lewd acts based on (1) touching C.'s genital area after asking if she had pubic hair; (2) touching R.'s genitals on two occasions when giving her a massage; and (3) touching R.'s breasts when in a tent with her and at his house. Kinney's theory is that although these acts were all described as consensual and there was no evidence of willful and unlawful use of force or violence for the purposes of the battery statute, the jury could have found that he committed battery if it concluded that the touching was *offensive* in that it was *sexually motivated*. However, under these circumstances, Kinney was not entitled to an instruction on battery because there is no circumstance in which the jury could have found him *not guilty* of committing a lewd act yet *guilty* of battery. Under Kinney's own theory of battery, the sexual nature of his touchings of the girls is the only thing that makes those touchings offensive. Therefore, the jury could not have concluded that the touchings were *not* lewd acts while also concluding that the touchings *did* amount to battery.

As substantial evidence in the record thus does not establish that Kinney could have been found guilty of battery but not guilty of committing lewd acts under section 288, subdivision (a), an instruction on battery as a lesser included offense was not warranted.

B. *The Trial Court Did Not Impose an Unauthorized Sentence on Count 2*

Kinney contends that the trial court improperly sentenced him under the current version of the One Strike law (§ 667.61) for his conviction on the lewd act count pursuant to section 288, subdivision (a) committed against C. (count 2) because, according to him, the conduct giving rise to count 2 occurred when a previous version of the One Strike law was in effect. According to Kinney, sentencing him on count 2 under the current version of the One Strike law violates his rights under the ex post facto clause of the United States Constitution and similar provisions of California law.

In its *current* version, the One Strike law requires a person convicted of committing a lewd act in violation section 288, subdivision (a) to be sentenced to an indeterminate prison term of 15 years to life when, among other things, "[t]he defendant has been convicted in the present case . . . of committing [a qualifying] offense . . . against more than one victim." (§ 667.61, subds. (b), (e)(4).) However, *prior* to September 2006, the One Strike law applied to defendants convicted under section 288, subdivision (a) "*unless* the defendant qualifies for probation under subdivision (c) of Section 1203.066." (§ 667.61, former subd. (c)(7), italics added.)[5] Section 1203.066, subdivision (c) details the findings that must be made for the court to apply an exception to the rule requiring it to deny probation to certain persons convicted of committing lewd

---

[5] Specifically, section 667.61, former subdivision (c)(7) provided that the statute applied to a "violation of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066." Effective September 20, 2006, former subdivision (c)(7) of section 667.61 was replaced by subdivision (c)(8), under which the statute applies to a "[l]ewd or lascivious act, in violation of subdivision (a) of Section 288 . . . ," with no express exception. (Stats. 2006, ch. 337, § 33.)

acts on children, including findings that the defendant has a parental relationship to the victim, rehabilitation is feasible, the defendant will be removed from the household for a period of time, and there is no threat of physical harm to the child.

Kinney argues that the prior version of the One Strike law applies to count 2, and that, accordingly, the People were required to plead and prove that Kinney violated section 288, subdivision (a) *and* that he was ineligible for probation under the standards set forth in section 1203.066, subdivision (c). Kinney's argument fails because substantial evidence supports a finding that Kinney committed count 2 *after* the September 2006 amendment to the One Strike law, and thus the current version of the One Strike law applies.

At the outset we note that the information charged Kinney with committing the lewd act against C. in count 2 between November 2006 and November 2008, and the jury was instructed that count 2 was based on conduct that occurred between those dates. Thus, the jury implicitly found that count 2 was committed *after* the amendment to the One Strike law in September 2006. The issue presented is whether substantial evidence supports that finding.

Count 2 was based on the incident in which Kinney touched C.'s genital area after asking her whether she had pubic hair while they were watching a movie about Woodstock. According to C.'s testimony, the incident occurred when she was nine or 10 years old and she was spending the night alone at Kinney's house. The record establishes that C. turned 10 years old in November 2006. Thus, according to C.'s statement that the incident took place when she was nine or 10 years old, it could have occurred *after* the

amendment to the One Strike law in September 2006. Further, although C. stated that the incident occurred when she was either nine or 10 years old, other details of her testimony support the more specific conclusion that it occurred when she was 10 years old. Specifically, C. remembered that the incident occurred when she was spending the night alone at Kinney's house, without the other girls, and she testified that she did not start spending the night alone at Kinney's house until she was 10 years old. Based on that testimony, substantial evidence supports a finding that Kinney touched C.'s genital area after she turned 10 years old in November 2006, which was after the amendment to the One Strike law.

Accordingly, we reject Kinney's argument that the prior version of the One Strike law applied to count 2, and we need not address whether the record supports a finding that he was ineligible for probation under the standards set forth in section 1203.066, subdivision (c).

C. *The Trial Court Was Not Required to Stay the Sentences for Counts 3 and 9*

Kinney argues that pursuant to section 654, the trial court was required to stay the sentences for the two counts charging him with using a minor to perform prohibited acts (counts 3 and 9).

Under section 654, subdivision (a), "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (*Ibid.*) "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course

of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] . . . [Citation.] If all the offenses were *incident to one objective*, the defendant may be punished for any *one* of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551 (*Perez*), italics added.)

"When . . . section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) We apply a substantial evidence standard of review when determining whether section 654 applies. "The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438; see also *People v. Osband* (1996) 13 Cal.4th 622, 730 [approving substantial evidence standard of review as stated in *Saffle*].)

Counts 3 and 9 were based on Kinney's conduct of taking a video of C.'s vagina and participating in the photocopying of R.'s crotch. Kinney argues that the trial court should have stayed the sentence on counts 3 and 9 because the "violations . . . occurred during the same time period, were part of a continuous course of conduct, and were committed with the same criminal objective as other counts of conviction." Kinney argues that his "single intent and objective in committing these acts was to engage in the lewd acts which occurred close in time" to counts 3 and 9. According to Kinney, he committed each of the counts with the same intent and objective, namely to act on his "unlawful attraction to young girls."

Kinney's argument fails because it depends on a misunderstanding of what constitutes a single criminal objective for the purposes of section 654. In a very broad sense the disparate acts committed by a child molester on different dates or against different victims will have in common the objective of molesting children, just as the acts of a thief will have in common the objective of stealing something, and the acts of an arsonist will have in common the objective of setting something on fire. But that is not the sense in which the concept of a single criminal objective is used in section 654. In the context of sex offenses, as here, our Supreme Court has explained, "[a]ssertion of a sole intent and objective to achieve sexual gratification is akin to an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts. To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability." (*Perez*, *supra*, 23 Cal.3d at p. 552.) Where a series of sex offenses is committed, and "[n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental to the commission of any other . . . ," "section 654 does not preclude punishment for each of the sex offenses committed by defendant." (*Id.* at pp. 553-554.) "A defendant may not bootstrap himself into section 654 by claiming that a series of divisible acts, each of which had been committed with a separate identifiable intent and objective, composes an 'indivisible transaction.'" (*People v. Massie* (1967) 66 Cal.2d 899, 908.)

Here, according to the testimony of C. and R., the videotaping of C.'s vagina and the photocopying of R.'s crotch took place at different times from the lewd acts that Kinney was found to have committed in counts 2, and 5 through 8. Specifically, Kinney's lewd act against C. occurred on a different day when she was watching a movie with Kinney, and Kinney's touching of R.'s vagina occurred on different days when he was massaging her, and his touching of R.'s breasts occurred one time when they were in a tent, and one other time at his house. Neither C. nor R. described any of the lewd acts as occurring on the same day as the conduct underlying counts 3 and 9, and neither of them described any of Kinney's crimes as being incidental to or constituting a means towards the commission of another. Therefore, we conclude that substantial evidence supports the conclusion that counts 3 and 9 were not part of the same indivisible transaction as the other lewd act counts and did not share the same criminal objective. Accordingly, the trial court was not required to stay the sentences on counts 3 and 9 pursuant to section 654.

D. *Kinney Is Entitled to Presentence Conduct Credits for His Indeterminate Sentence*

At sentencing, the trial court did not award Kinney conduct credits under section 4019 for his indeterminate term on count 2. The abstract of judgment reflects that decision.

Kinney argues that the trial court should not have denied him conduct credits for his indeterminate term. The People agree. As the People point out, no authority exists for prohibiting the award of conduct credits to an indeterminate term, and case law holds to the contrary. (See *People v. Philpot* (2004) 122 Cal.App.4th 893, 908; *People v.*

Brewer (2011) 192 Cal.App.4th 457, 461.) The only applicable limitation is that presentence conduct credit is limited to 15 percent of actual time for persons, such as Kinney, who are convicted of the crimes enumerated in section 667.5, including committing lewd acts in violation of section 288, subdivision (a). (§ 2933.1, subd. (c).) Both parties agree that Kinney accordingly should have been awarded five days of conduct credit on his indeterminate term. We will order that the abstract of judgment be amended to reflect five days presentence conduct credit for Kinney's indeterminate term of 15 years to life on count 2.

DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect five days of presentence conduct credit for the indeterminate term of 15 years to life on count 2 and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitations. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.