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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES PEACE, JR.,

Defendant and Appellant.

E053081

(Super.Ct.No. RIF148061)

OPINION

APPEAL from the Superior Court of Riverside County. J. Richard Couzens, Judge. (Retired judge of the Placer Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Reed Webb, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez, and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant James Peace, Jr., appeals after he was convicted of two counts of inflicting corporal injury on his children. (Pen. Code, § 273d, subd. (a).) He raises a single contention of instructional error. We affirm.

FACTS AND PROCEDURAL HISTORY

Defendant is the father of S.P., a 14-year-old girl, and J.P., a 12-year-old boy.¹ In 2002, when S.P. was eight years old, defendant was convicted of one count of inflicting unlawful corporal punishment on her. In April 2002, S.P. reported to a teacher that defendant had beaten J.P. and kept J.P. home from school as a punishment. The teacher called a Child Protective Services (CPS) social worker to investigate. CPS social worker Susan Mahoney went to the children's residence and left a business card on the door.

When defendant got home and found the social worker's card, he became angry with S.P. He demanded to know why S.P. was talking to a social worker. He made her sit on the couch and he hit her with his hands. He picked her up and threw her on the floor, causing her to cut her arm on a glass clock. He ordered her to go to her bedroom, where he came in with a belt and beat her. Defendant telephoned the social worker and left a message for her. He identified himself and stated that he did not want to be bothered by CPS about his daughter. Every time S.P. got into trouble, she tried to get other people involved. Defendant said that he "knows how to spank his children correctly," and told the social worker that he was "going to instruct his daughter to keep her mouth shut." Defendant did not want the social worker to call him back, "that he

¹ The children's ages at the time of the incidents charged in this case.

would get more irritated at [S.P.] for . . . causing all this chaos.” Defendant also told the social worker that, “I’m a fun-loving person, but I don’t know how to reprimand my children in a loving way, and I have a problem with my anger.””

After this incident, S.P. told her teacher and showed a bruise on her leg. The CPS social worker responded to the school and interviewed both S.P. and J.P. S.P. told the social worker that defendant had gotten angry because she had not told him that she had talked to a social worker. J.P. confirmed this. The investigating police officer verified a three-inch round bruise on S.P.’s leg, and a two-inch cut on her arm. Defendant admitted to the social worker that he had hit S.P. with a belt on April 19, 2002.

As a result of these events in April of 2002, defendant was convicted in 2003 of one felony count of inflicting corporal injury to a child (Pen. Code, § 273d, subd. (a)), one felony count of witness intimidation (Pen. Code, § 136.1, subd. (a)), and one misdemeanor count of battery (Pen. Code, § 242). He was granted probation for 36 months, including the condition that he attend an anger management program. He was later imprisoned for a violation of probation, on a charge of auto theft.

Defendant lost custody of the children after his 2003 conviction. While defendant was incarcerated, the children’s birth mother died (2005). After defendant’s release from prison, he began living with Joann Williams, and married her in 2007. Defendant also enrolled in an anger management class as a condition of his parole. Eventually, his children were returned to his custody in the home defendant shared with Williams. Defendant also attended parenting classes, where he learned to use positive reinforcement

and other techniques for guiding and disciplining the children. Defendant testified that he generally left the correcting to Williams, and agreed that he considered himself a “strict father.”

In October of 2008, the children again came to the attention of the authorities, after police responded to a call of a domestic dispute between defendant and Williams. Defendant was becoming violent, and Williams threw a plate of spaghetti at him. Williams told the police that defendant had control issues and that he had been violent with the children. Williams had called CPS. Williams told someone at CPS that defendant had been hitting the children for about the previous six months. The children were afraid and thought that defendant was trying to kill them.

After defendant and Williams talked to the police, defendant volunteered to leave the residence. Williams later got a restraining order against defendant.

About two weeks later, on October 30, 2008, Williams called CPS and the police again about allegations of abuse. Police questioned the children, who each described several incidents of physical punishment.

J.P. told police that, one or two weeks earlier, defendant had hit him in the face with a closed fist because of “sloppy homework.” The punch left a bruise that Williams had seen. Another time when J.P. did not do his homework, defendant hit him with a belt on his back, hands and thighs. The buckle of the belt left a visible scar on J.P.’s back. Defendant once kicked at J.P. when J.P. was late for football practice. J.P. attempted to block the kick with his hand, but the kick was delivered with such force that J.P.’s finger

became severely swollen; J.P. had to have the hand X-rayed. On another occasion when J.P. was running late, defendant hit him with a steering wheel locking device, called “the club.” Defendant struck J.P. about the face, hands and thighs, causing J.P.’s hand to swell and his face to bruise. Several months earlier during a family vacation, defendant used a wooden towel rack to hit J.P. repeatedly all over his body, including his head.

Dr. Susan Horowitz conducted a forensic examination of J.P. J.P. recounted the time that his father hit him with “the club,” and said that defendant hit him in the stomach hard enough to knock out his breath. J.P. still had a swollen finger, which he said happened when he blocked defendant’s kick. The X-ray did not reveal a fracture. Dr. Horowitz saw an irregular mark on J.P.’s back where an injury had healed without the return of pigment.

S.P. told the investigating officers that, two weeks before the interview, defendant had hit her in the arm with his fist. S.P. had also recently gotten into trouble when a neighbor reported to the parents that she had had some teenage boys visiting the house when defendant and Williams were not at home. S.P. was not supposed to be talking to boys. Defendant hit S.P. across the legs with a metal broom handle until Williams intervened and told him to stop. By the time of the forensic examination, S.P. still had marks on her legs, consistent with being struck by a broom handle. Defendant then resorted to spraying S.P. with a pressure washer to punish her. He held the nozzle about a foot from her face when doing this. More than once, Williams intervened and directed defendant to stop, but then he would resume spraying S.P. with the pressure washer. He

also threw the implement at S.P., causing a gash in her head. Defendant then made S.P. sleep in the garage as further punishment. On another occasion, defendant slapped S.P. across the face hard enough to cause her to fall down and black out. Yet another time, defendant tried to slap S.P., but scratched her eye.

These events led to the filing of two felony charges of inflicting unlawful corporal punishment, one count for each child.

At trial, the children gave testimony which tended to minimize or excuse defendant's actions. For example, J.P. testified that defendant hit him hard on his upper arms only, open-handed only, but never hard enough to leave a bruise. Defendant never spanked him with a belt. When defendant punished J.P. on vacation, defendant used only his hand, not the wooden towel bar. Defendant never hit him with "the club," but only pointed it at him and said, "Don't make me use this." J.P. said that the injury to his finger was accidental.

S.P. also claimed at trial that her accounts to the police were exaggerated. Defendant never hit her with the pressure washer. He did not slap her hard enough to knock her down, as she had told police. S.P. claimed that she lied to help Williams implement a plan to get defendant out of the house.

Defendant testified on his own behalf at trial. Like the children, he gave accounts which tended to minimize, excuse or explain away what had happened. Defendant said that he generally avoided disciplining the children, but left it to Williams. Standard punishments involved loss of privileges.

Defendant admitted that he became angry when S.P. lied about not having the boys at the house. He took a swat at her with an open hand, which she blocked with her arm. He did not hit her with a broom handle. Instead, he decided to punish her by spraying her with water while she ran in place; he denied that the pressure machine was on when he did this. He then made her sleep in the garage.

Defendant denied hitting S.P. on the arm as she had told police, though he admitted “back-handing” her when she talked back to him. Defendant also admitted he had “a way of back-handing” J.P. over his schoolwork, but “on the arm or the shoulder.” Defendant back-handed the children “when I am trying to get their attention to focus on what we are doing here.” He admitted sometimes hitting J.P. with an open hand, to get him to focus his attention. None of the blows to J.P. left any marks or bruises. Defendant never hit J.P. with “the club.” He only threatened to do so: ““Don’t have me get the club.”” After this warning, J.P. cooperated with defendant. The only other time defendant used any physical force with J.P. was to give him a “hurry-up kick” once, when J.P. was late for football practice. J.P. blocked the kick with his hand; defendant’s foot accidentally jammed J.P.’s finger.

Defendant also testified that he had never hit J.P. with a belt for punishment. Rather, there was one incident of horseplay, in which family members were snapping towels at one another. J.P. retrieved a belt and snapped it at defendant; defendant snapped J.P. back with the belt and then declared the game over. The belt left only a small red mark on J.P.’s back.

The jury did not credit defendant’s claims, but convicted him on both counts. The jury sentenced defendant to a term of five years four months (four years on count 1, 16 months consecutive on count 2) in state prison.

Defendant filed a timely notice of appeal.

ANALYSIS

I. Standard of Review

Defendant contends that the trial court erred in failing to give, sua sponte, an instruction on the defense of accident.² Defendant did not request this instruction.

In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury’s understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) “A trial court’s duty to instruct, sua sponte, on particular defenses arises ““only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.”” (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

On the other hand, where an instruction does not involve general principles of law, but relates particular facts to a legal issue in the case (“pinpointing” the crux of a

² CALCRIM No. 3404 provides in part as follows (as to general or specific intent crimes): “[The defendant is not guilty of _____ <insert crime[s]> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <insert crime[s]> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]”

defendant's case), such a "pinpoint" instruction must be given on request, but there is no sua sponte duty to give it. Pinpoint instructions, like general instructions, are appropriate only when there is evidence to support the defense theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119, 1120.)

A defendant's challenge to the propriety of the trial court's jury instructions normally raises an issue of law that we review de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law. . . ." (*Ibid.*) Whether the "defense of accident" is a general principle of law, subject to a sua sponte duty to instruct, or a pinpoint instruction, as to which an instruction must be requested, also presents an issue of law, which we would review de novo.

If we determined that the instruction was a pinpoint instruction, requiring request, we could reject defendant's contention without further discussion. (See *People v. Fiu* (2008) 165 Cal.App.4th 360, 370 ["A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."].)

However, the courts have generally recognized a sua sponte duty to instruct on, e.g., mistake defenses. (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661, fn. 2.) By analogy, the defense of accident should generally be subject to a duty to instruct sua sponte, where it is applicable.

In case of either type of instruction, requested pinpoint instruction or sua sponte instruction on general principles, such instruction must be given only if the instruction is supported by the evidence. This issue is reviewable under the substantial evidence standard.

II. There Was No Substantial Evidence to Support Instructing on the Issue of Accident

Defendant urges that, although there were many separate incidents offered, as to each child, to support the charges, it is not possible to determine which particular acts the jury unanimously found true in returning their verdicts. Because some of the proffered instances of abuse might have been the result of accidental causes, the jury might have based the convictions on conduct that was accidental only. Defendant points, for example, to the incident of injury to S.P.'s eye. She told authorities that defendant hit or scratched her eye one time when he tried to slap her. Defendant's version of this incident was that he used his hand to push her away when she was crowding his back and interfering with him while he was using the computer; his fingernail accidentally scratched her eye. Defendant also argues that, "It also may be inferred that the swollen knuckle sustained by [J.P.] was accidental and not a natural and probable consequence of what most people would consider a harmless kick in the pants to hurry up a lagging youngster."

Penal Code section 26 provides: "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five--Persons who committed the act or made the omission charged *through misfortune or by accident*, when

it appears that there was no evil design, intention, or culpable negligence.” (Italics added.) “The accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime. [Citations.]” (*People v. Lara* (1996) 44 Cal.App.4th 102, 110.)

The evidence did not support defendant’s claim of accident, and he largely did not rely on a defense of accident.

J.P.’s trial testimony tended to minimize, but not negate, defendant’s conduct. J.P. testified that defendant hit him “hard” on his upper arms, with an open hand, but not hard enough to leave a bruise. Defendant did not slap his face or spank him with a belt. As to the incident on vacation, J.P. said that defendant only hit him with his hand, not a towel bar. J.P. said that defendant never hit him with “the club,” but only pointed to it and stated, “Don’t make me use this.” He believed the finger injury was “accidental,” when his father kicked at him and he blocked the blow with his hand.

This testimony did not amount to or evidence a claim of “accident.” J.P. testified that, as to some of the incidents, defendant did in fact hit him, but left no marks. J.P.’s testimony described deliberate, not accidental, strikes, but denied any injurious effect. J.P.’s denials that some of the incidents had happened, were also wholly inconsistent with any claim of “accident.” It is not possible to “accidentally” do something that did not happen.

Defendant’s version of events as to J.P. also negated reliance on an accident theory. Although J.P. denied being hit with a belt, defendant admitted he had done so,

though he claimed to have done so only in horseplay. By his own admission, defendant “popped” J.P. with the belt, and immediately terminated the game, precisely because it had escalated with a high potential for injury. Defendant also testified that he had “a way of back-handing” and admitted putting his hands on J.P., though he attempted to minimize his culpability by claiming he did so only with an “open hand” and without causing bruises.

S.P. testified at trial, also minimizing the incidents of abuse. She testified that defendant did not hit her with the pressure washer. The incident in which defendant supposedly slapped her so hard that he knocked her down and she blacked out did not happen.

Defendant denied hitting S.P. with the broom handle. He did admit swatting at S.P. with his hand when she admitted she had had the high school boys in the house while her parents were absent. Defendant also denied hitting S.P. with the pressure washer, but did admit making her run in place while he sprayed her with water, and he did so again even after Williams intervened to stop him. He admitted making S.P. sleep in the garage as a punishment.

Defendant did not rely on a defense of accident as to S.P. He claimed that some of the incidents had never happened at all. That claim is inconsistent with a defense of accident. Defendant also admitted smacking S.P. on several different occasions, although he claimed she was not injured. He admitted hosing her down, but denied that the pressure mechanism had been turned when he did so. He admitted making her sleep in

the garage, though he minimized the time period and described giving her an air mattress and sleeping bag. Defendant's own testimony describes deliberate conduct, but only denies injurious results. These claims are also inconsistent with a defense of accident. The only injury which could conceivably fall under the rubric of accident, was when defendant pushed S.P. away while he was at the computer, and he may have accidentally scratched her eye. However, he in essence admitted many other instances of intentionally punitive conduct, even though he denied the infliction of any injury. (See, e.g., *People v. Villanueva* (2008) 169 Cal.App.4th 41, 50 ["an accidental shooting is *inconsistent* with an assertion of self-defense"]; *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1358 [Fourth Dist., Div. Two].)

Defense counsel's argument was in the same vein. As to some of the alleged incidents of abuse, he argued that they never happened. As to others, he conceded that defendant did physically discipline the children, but he did so reasonably, without inflicting any injury.³ Both claims—that nothing happened, or that defendant did act intentionally but did not inflict any injuries—are inconsistent with a defense of accident.

³ Counsel argued in part that some incidents must not have happened, because they were not reported, and no pictures were taken. The claim that defendant had hit J.P. in the face with "the club" was "unattainable [*sic*: untenable]" because, after defendant had allegedly struck J.P. with the implement, they went to the orthodontist, and J.P. went to school the next day, yet no one at the orthodontist's office or at school reported any facial injury to J.P. Williams and S.P. had motives to lie or exaggerate about defendant's conduct. Defendant did hose down S.P. and make her stay in the garage, but he did not injure her. Defendant did confront S.P. about missing the bus, but claimed he only "tapped" her. Defendant admitted striking J.P. when confronting him about lost lunch money (same incident as the allegations about "the club"), but denied that he left any

[footnote continued on next page]

A court need not give a requested instruction on a purported defense unless it is supported by evidence that is substantial, i.e., that the evidence is reasonable, credible and of solid value. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, superseded by statute on another point as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 773; see *People v. Breverman*, *supra*, 19 Cal.4th 142, 148-149.) There was no such substantial evidence of accident in this case, so as to support a sua sponte instruction.

III. Any Error Was Harmless

Even if the trial court erred in failing to instruct on the defense of accident, however, we find no prejudice from the omission. Defendant urges that we should apply the *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824] (*Chapman*) standard of prejudice, i.e., that reversal is required unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. That is, defendant argues that the standard for constitutional error should apply because the failure to give an instruction on the defense of accident shifted or lessened the prosecution's burden of proof, to the detriment of defendant's rights to due process and a fair trial.

However, in a similar context, the court in *People v. Russell* (2006) 144 Cal.App.4th 1415, stated: "Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818

[footnote continued from previous page]

marks or bruises. Defendant did sometimes slap or hit the children, but he had done so only within the bounds of reason.

[*Watson*].” (*Id.* at p. 1431.) In *People v. Corning* (1983) 146 Cal.App.3d 83, the appellate court applied the *Watson* standard of prejudice (without considering first whether the *Chapman* standard should apply) in concluding that the trial court’s failure to instruct on the defense of accident was harmless error. (*People v. Corning, supra*, at p. 89.)

We need not determine which standard of prejudice applies, however, because we conclude that any conceivable error was harmless under either standard. Defendant proffered only one possible example of accidental action: when he moved his hand to prevent S.P. from interfering with him while he was at the computer. His version of events was that his fingernail accidentally grazed her eye. As to all the other events, the defense theory was that the incidents never happened at all, or that defendant did physically strike or punish the children, but had not done so with sufficient force to injure them. Thus, the evidence was undisputed that certain incidents as to each child had taken place; the only dispute was whether defendant had injured them in so doing. The crux of the matter was credibility: Which version of events did the jurors believe?

The jury was instructed on the elements of the charged offenses, including that a traumatic condition “would not have happened without the punishment or injury.” (CALCRIM No. 822.) The jury received instructions on attempt (CALCRIM No. 460), and the lesser offenses of simple battery (CALCRIM No. 960) and simple assault (CALCRIM No. 915). The jury was instructed that a parent had the right to punish a child with justifiable physical force or another justifiable method of discipline, and that

the People “must prove beyond a reasonable doubt that the force or method of punishment used was not justifiable. If the People have not met this burden, you must find the defendant not guilty of the charged crime and any lesser included offense.” (CALCRIM No. 3405.)

Had the jury credited defendant’s version of events, it could not, under the instructions given, have found him guilty of the charged offenses. If the factual question posed by the omitted “accident” instruction was necessarily resolved adversely to defendant under other, proper instructions, then the failure to give the instruction was harmless. (*People v. Sedeno* (1974) 10 Cal.3d 703, 721) It is not reasonably probable that the result would have been any different had the instruction been given (*Watson, supra*, 46 Cal.2d 818, 836), and we also find, beyond a reasonable doubt, that the failure to give the accident instruction did not contribute to the verdict (*Chapman, supra*, 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824]).

DISPOSITION

The judgment is affirmed.

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MCKINSTER
Acting P.J.

We concur:

RICHLI
J.

MILLER
J.