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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.

JEFFREY CHARLES WRIGHT,

Defendant and Appellant.

E053690

(Super.Ct.No. SWF026898)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed.

Christopher Nalls, 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, Garrett Beaumont and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Jeffrey Charles Wright guilty of 20 counts of lewd and lascivious conduct on a child under the age of 14. (Pen. Code, § 288, subd. (a).) Defendant was sentenced to a total term of 46 years in state prison. On appeal, defendant contends that the trial court prejudicially erred in denying his request to instruct the jury on simple battery as a lesser included offense. We reject this contention and affirm the judgment.

## I

### FACTUAL BACKGROUND

Between June 2006 and June 2007, defendant touched his then girlfriend's 12-year-old daughter in the vaginal area on numerous occasions. Specifically, Jane Doe recalled defendant bathing her every other day for six months to a year. During those times, defendant would sometimes touch or rub the outside of her vagina and buttocks with his hand. Jane estimated that defendant touched her vagina while bathing her about four times. Jane also testified that defendant touched her vagina for longer than a second over her clothing while she slept with defendant in his bed about 10 times or more.

Jane further recalled an incident where she was jumping on the bed on her hands and knees. While bouncing on the bed, defendant came into the room and moved up against her, touching his penis against her buttocks. When Jane stopped, defendant stated, ““Why did you stop? That felt good.””

Defendant also tickled Jane; he started in the stomach area and then he would glide his hand into her pants and rub his hand around her vaginal area. Jane remembered this occurring about five or 10 times. On one occasion, defendant pulled Jane's pants and underwear down to her ankles, lifted her legs up, put his head between her legs, and blew air on her vagina for a few minutes. Jane did not tell anyone what was occurring or tell defendant to stop because she was afraid of defendant.

On several occasions, defendant showed Jane "young adult" pornography on his computer while she sat on his lap. He also asked Jane a couple of times if she had ever masturbated. One time he demonstrated for her by rubbing the crotch of her bathing suit, which was sitting on the washing machine.

The touching stopped when defendant and Jane's mother ended the relationship. About two years later, Jane informed her aunt and mother about the molestations.

Defendant initially denied bathing Jane, but then admitted rinsing her with water once as a "bonding thing." Defendant also admitted tickling Jane and claimed that he had touched her vagina by accident. During a later interview, defendant explained that he had tickled Jane about 50 times, and that during 20 of them, he had accidentally touched Jane's vaginal area. He further stated that most of those incidents were over her underwear, but a couple of times he had touched her under her underwear. He also admitted that while washing Jane, he may have touched her vagina with the tip of his finger accidentally no more than six times. He also confirmed the blowing incident but claimed that he only blew on Jane's stomach.

Defendant denied intentionally touching Jane's vaginal area or ever touching Jane with any intention of sexual arousal. He, however, admitted that he had sexual thoughts about Jane 10 or 20 times after he saw Jane naked on his bed and also when he saw her running around his home naked. He denied having sexual thoughts about Jane while he tickled her, and he claimed that Jane was "coming on" to him in a "mild sexual fashion." He also stated that he had prayed to God that he would stop having sexual thoughts about Jane.

At the time of defendant's arrest, police found a photograph of Jane in his wallet. Police also found about 200 photographs of child pornography on defendant's business computer.

Jane Doe No. 2 testified that about 23 years ago, when she was eight years old and her mother was dating defendant, defendant had taken her horseback riding as a birthday present. When they returned home, defendant suggested that they go "skinny-dipping" in his swimming pool. While they were in the pool, defendant asked her to sit on his lap and she felt his erect penis. After they got out of the pool, defendant took a shower with Jane No. 2 and washed her genitals. He also had her wash his genitals. After the shower, defendant took Jane No. 2 into his bedroom, laid her down on the floor, touched her genitals with his fingers, and performed oral sex on her. Defendant told Jane No. 2 not to say anything or he would kill her mother.

## II

### DISCUSSION

Defendant contends that the trial court prejudicially erred by denying his request to instruct the jury on simple battery as a lesser included offense to the charged crimes of committing a lewd act on a child under the age of 14.

It is settled that in criminal cases, even in the absence of a request, the trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*)). The general principles of law include instructions on lesser included offenses if there is a question about whether the evidence is sufficient to permit the jury to find all the elements of the charged offense. (*Ibid.*) There is no obligation to instruct the jury on theories that do not have substantial evidentiary support. (*Id.* at p. 162.) “[T]he 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.]” (*Ibid.*) Evidence is substantial if it would permit the jury to conclude the lesser offense was committed, but the greater offense was not. (*Ibid.*)

A lesser offense is included in the charged offense if either of two tests is met. The first test is the statutory elements test. This test provides that a lesser offense is included in the greater offense when all of the statutory elements of the greater offense include all of the statutory elements of the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) In other words, it is not possible to commit the greater offense without

also committing the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1230.)

The second test is referred to as the accusatory pleading test. This test provides that a lesser offense is necessarily included in the greater offense if the allegations in the charging document establish that if the greater offense was committed as pled, then the lesser offense also must have been committed. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.) If the trial court fails to instruct on a lesser included offense, reversal is required only if an examination of the entire record establishes a reasonable probability that the error affected the outcome of the trial. (*Breverman, supra*, 19 Cal.4th at p. 165.)

The parties acknowledge that there is a split of authority among the various Courts of Appeal as to whether battery is a lesser included offense of lewd conduct under Penal Code section 288. The court in *People v. Santos* (1990) 222 Cal.App.3d 723, 738-739, held that battery was not a lesser included offense of lewd conduct. The issue is now before our Supreme Court, which granted review of two recent decisions that reached opposite conclusions on this issue: *People v. Gray* (2011) 199 Cal.App.4th 167, review granted December 14, 2011, S197749 (battery is a lesser included offense of lewd conduct); and *People v. Shockley* (2010) 190 Cal.App.4th 896, review granted March 16, 2011, S189462 (battery is not a lesser included offense).<sup>1</sup> Defendant asks us to join those courts which have held that battery is a lesser included offense of lewd conduct.

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<sup>1</sup> In his opening brief, defendant cited *People v. Gray* to support his contention that there was sufficient evidence to support a battery instruction. Because that opinion is now on review, it is not citeable. (Cal. Rules of Court, rules 8.1105(e)(1), 8.1115(a).)

We need not take a position on the issue, however. Even if battery is considered a lesser included offense of a Penal Code section 288 violation, we would conclude the evidence did not support giving a lesser included instruction in this case. Further, even if the instruction was warranted in this case, we would find any error harmless.

Defendant argues there was evidence he did not have the specific sexual intent required for a conviction under Penal Code section 288, but the jury could have found some of the touching was simple battery because “the jury heard evidence of [his] insistence that he never touched Jane Doe with sexual intent.” We disagree.

Defendant’s defense as to all of the 20 counts was that he touched Jane’s vagina accidentally. To find that defendant had committed simple battery under Penal Code section 242, the jury would have had to concluded that he willfully touched Jane in a harmful or offensive manner. (*People v. Martinez* (1970) 3 Cal.App.3d 886, 889.) The term “willful” in this context means “on purpose.” (*People v. Lara* (1996) 44 Cal.App.4th 102, 107 [willful in the crime of battery means ““simply a purpose or willingness to commit the act””].)

There was no substantial evidence to support this theory. The evidence at trial supported only two scenarios. In the prosecution version of events, defendant touched Jane for sexually motivated reasons and in a manner that was overtly sexual in that he touched her vagina. The defense version was that defendant formed no intent whatsoever because he had accidentally touched Jane’s vagina. In defendant’s characterization of the incidents he could not have committed battery because he did not act in a willful or purposeful manner. (See Pen. Code, § 26, class Five [a person does not commit a crime

when he or she commits an act by accident under circumstances that show no evil design or intention].) No substantial evidence supported a third “battery” scenario, in which defendant touched Jane but with a nonsexual motivation. Indeed, given the nature of the alleged touching—direct sustained contact with Jane’s vagina on numerous occasions—and the corroborating evidence, the jury had no basis to conclude defendant engaged in willful and offensive but nonsexual touching.

Defendant asserts that his “statements **alone** were substantial evidence that he did not have a sexual intent when he touched [Jane].” We do not find this thin assertion constituted substantial evidence that would have warranted a lesser included battery instruction. (*People v. Valdez* (2004) 32 Cal.4th 73, 116 [there must be evidence a reasonable jury could find persuasive to warrant instruction on lesser offense].) Moreover, even if the evidence warranted a trial court instruction on battery, we would find any error harmless.

As previously noted, the failure to instruct on a lesser included offense is only reversible error if it appears reasonably probable the defendant would have obtained a more favorable outcome had the instruction been given. (*Breverman, supra*, 19 Cal.4th at p. 178.) *People v. Thomas* (2007) 146 Cal.App.4th 1278 (*Thomas*), a case relied upon by defendant, is instructive. In *Thomas*, the court concluded battery was a lesser included offense of lewd acts on a child. (*Id.* at p. 1282.) The evidence established that the defendant touched one victim multiple times. The victim testified that on one occasion, the defendant got into bed with him and touched him under his boxer shorts. (*Id.* at p. 1294.) The defendant admitted he touched the victim’s buttocks, but contended he was

only attempting to wake the victim and was not sexually aroused. (*Ibid.*) He denied touching the victim underneath his boxer shorts. (*Ibid.*) The *Thomas* court found the court's failure to give a battery instruction was not prejudicial as to that count. In light of the evidence of the defendant's other sexual offenses against the victim and other boys, the court determined it was not reasonably probable the jury would have accepted the defendant's account over the victim's to conclude the incident was merely offensive touching rather than a lewd act. (*Thomas*, at pp. 1293-1294.)

However, another count in *Thomas* was supported by the victim's testimony that the defendant entered a basement where the victim was playing a videogame. (*Thomas*, *supra*, 146 Cal.App.4th at p. 1284.) The defendant touched the victim on the shoulder, and the victim pulled away. As to this count, the court found the trial court's failure to instruct the jury as to battery was prejudicial. The court concluded: "Defendant's purpose in committing that particular touching was critical to determining his guilt under [Penal Code] section 288. [Citation.] The trial court erred in not instructing on battery because a reasonable jury could have concluded that the touching was offensive to [the victim] in light of defendant's other conduct, but that it was not committed with intent to gratify defendant's sexual desires. In light of the objectively nonsexual nature of the act, it is reasonably probable that a jury would have convicted [the defendant] of battery on that count." (*Thomas*, *supra*, 146 Cal.App.4th at p. 1294.)

No objectively nonsexual acts were at issue in this case. Jane testified that defendant touched or rubbed the outside of her vagina about four times while bathing her; touched her vagina for longer than a second over her clothing at least 10 times while they slept together; pressed his penis against her buttocks while she jumped on the bed; tickled her vagina five or 10 times; and pulled down her underwear, held up her legs, and blew on her vagina once. Additionally, defendant had similarly molested another child of a former girlfriend 20 years ago. And he was found in possession of about 200 images of child pornography. It is not reasonably probable that the jury would have convicted defendant of battery, but not lewd acts as to any of the 20 counts alleged. Defendant's explanation that he had touched Jane's vagina accidentally, either while bathing or tickling her, was extremely incredible under the circumstances.

Despite the jury's request for a read back of Jane's testimony and defendant's statements, the speed with which the jury made its decision suggests it did not struggle in finding defendant not credible or in concluding the prosecutor had proved the elements of the crimes as charged. (*People v. Robertson* (1982) 33 Cal.3d 21, 36 [short jury deliberations likely reflected the strength of the prosecution's case].) As noted above, in light of the overtly sexualized nature of the touching in this case and the absence of any credible explanation, it is not reasonably probable the jury would have concluded

defendant engaged in offensive but nonsexual touching if the court had instructed on battery as a lesser included offense.<sup>2</sup> Defendant fails to establish reversible error.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

KING

J.

MILLER

J.

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<sup>2</sup> Defendant contends that the trial court's failure to instruct on battery as a lesser included offense of lewd acts constituted constitutional error under *Chapman v. California* (1967) 386 U.S. 18. Defendant's claim is unavailing. The court in *Breverman* proclaimed that "in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice *exclusively* under [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836]." (*Breverman, supra*, 19 Cal.4th at p. 178, italics added.)

Although the facts in *Breverman* involved only a failure to instruct sua sponte, our Supreme Court made no distinction between the trial court's sua sponte obligation to instruct and an obligation to instruct when requested. As such, we follow the precedent of our Supreme Court and apply the *Watson* test. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, in this case, even if we were to apply the standard for constitutional error under *Chapman*, the overwhelming evidence of defendant's guilt would still lead us to conclude that any error in failing to instruct on battery was harmless.