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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.

DENNIS EDWARD LUCAS, JR.,

Defendant and Appellant.

E054162

(Super.Ct.No. RIF140704 &
RIF10002074)

OPINION

APPEAL from the Superior Court of Riverside County. Gordon R. Burkhardt,
Judge. Affirmed in part, reversed in part.

Donna L. Harris, 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, A. Natasha Cortina and Ronald A.
Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Dennis Edward Lucas, Jr., of four counts of lewd and lascivious acts upon minors T.G., M.G., J.L., and A.B. (counts 1-3 & 5 respectively—Pen. Code, § 288, subd. (a));¹ and one count of annoying and molesting a minor, M.G. (count 6—§ 647.6, subd. (a)).² The trial court sentenced defendant to an aggregate, determinate term of 12 years imprisonment. On appeal, defendant contends the court prejudicially erred in declining to instruct the jury with CALCRIM No. 3404, accident, with respect to counts 2 and 6 and with CALCRIM No. 3500, the unanimity instruction, with respect to count 5. We agree the court prejudicially erred in failing to instruct the jury with the unanimity instruction on count 5 and, therefore, reverse the conviction on that count. In all other respects the judgment is affirmed.

FACTUAL AND PROCEDURAL HISTORY

Defendant was the campus supervisor at Fremont Elementary School (Fremont). The campus supervisor secures the campus to ensure the safety of the children; he walks the grounds to ensure unpermitted persons do not come onto campus and bother any of the students.

A.A. (born November 1994) testified that when she was around 10 years old, in the fifth grade at Fremont, defendant turned her around, grabbed her right hand, and

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

² The jury acquitted defendant of a count 4 charge of annoying and molesting a minor. (§ 647.6, subd. (a).)

touched it to his penis on the outside of his clothes.³ A.A. told her mother, who reported it to the school.

Deborah Ausman-Haskins, the principal at Fremont from October 1999 to May 2007, testified that at some point in 2005 or 2006, A.A. came to her and made allegations that defendant had behaved inappropriately with her. She interviewed both defendant and A.A. She then informed defendant he was not to have any physical contact with students. She did not report the incident to the authorities because “it did not reach that level of concern.”

M.G. (born August 1995) testified she attended Fremont from kindergarten through the fifth grade. Defendant twice did things to her that made her uncomfortable. The first time occurred at a basketball game when she was in the fifth grade, where defendant was standing next to her and began rubbing her breast over her clothes. The other occurred when defendant was in his office and she saw him grabbing his privates while smiling and looking at her.

Around July 18, 2007, M.G. told Fremont principal Patti Popovich about both incidents. Popovich subsequently had a discussion with defendant about the latter allegation. Defendant asked her who had made the allegation; Popovich told him she could not tell him; defendant asked if it was M.G. Defendant wrote a statement in which he indicated he had no recollection of such an incident. Popovich spoke with M.G.’s

³ A.A. testified as a propensity witness pursuant to Evidence Code section 1108. The People did not charge defendant for his alleged behavior with respect to A.A.

mother regarding the incident, but did not take any administrative action against defendant because defendant denied any wrongdoing and there were no other witnesses.⁴

On November 28, 2007, another student's mother reported to Popovich that her daughter had been touched inappropriately by defendant. Popovich called human resources, which told her to call the police; she did so. The same day, she sent a letter home to students' parents informing them the campus supervisor had touched a student inappropriately and had been arrested. Four students then came forward and disclosed allegations of inappropriate behavior by defendant. On November 30, 2007, Popovich held an assembly about "the safety and well-being of [the] students." After the assembly, another student came forward with an allegation against defendant.

Child Forensic Interviewer and Social Worker Kathleen Hiebert interviewed A.B. on March 10, 2010. During trial, the People played a video recording of the interview. A.B. reported that in the second grade, defendant touched her in inappropriate ways on three occasions. On one occasion, defendant tried to put his hand inside her shirt. On another occasion, defendant touched her "butt" and thigh while they were walking. The third time, defendant grabbed her hand and placed it on his penis over his clothing.

A.B. (born August 1998) testified at trial that once when she was seven years old and in the second grade, defendant repeatedly placed his hand on her butt while walking at her side. On another occasion, while she was sitting on a bench, he put his hand over her shoulder and she "guess[ed]" he was trying to reach inside her shirt. A third incident

⁴ The evidence adduced regarding the acts against M.G. formed the basis for counts 2 and 6.

occurred when defendant was holding her hand and placed it on his penis over his clothing.⁵

T.G. (born December 1996) was interviewed on December 7, 2007, during which she reported that one week earlier, defendant rubbed her breast, then rubbed himself, and made “weird” noises. She told her mom who told the principal. T.G. testified at trial that during recess while in the fifth grade at Fremont, defendant touched her breast, asked her if it felt good, and then rubbed his penis. She told her mother, who called the school.⁶

J.L. (born March 2000) was interviewed on January 8, 2008. She reported defendant inappropriately rubbed her chest with his fingers and hand during recess. At trial, J.L. testified that after she retrieved a ball during recess, defendant touched her right breast with his index and middle finger in a scissoring motion. After an assembly a couple months later, she reported the incident to a teacher. She insisted defendant’s act was not an accident.⁷

DISCUSSION

A. CALCRIM NO. 3404

At the conclusion of trial, defense counsel requested the court instruct the jury with CALCRIM No. 3404, the pattern jury instruction on accident stating, “[T]he bench

⁵ A.B.’s testimony established the basis for count 5.

⁶ T.G.’s testimony established the basis for count 1.

⁷ J.L.’s testimony established the basis for count 3.

notes indicate that the Court has a sua sponte duty to instruct on accident.^[8] First, if the defense requested it, which I am, and if there is substantial evidence supporting it, and either the defendant is relying on. We are strongly relying on the accident instruction.” Defense counsel argued substantial evidence supported giving the instruction with respect to counts 3 and 6.

The People argued that no evidence supported a conclusion that any of the charged acts were accidents: “Accident is really a state of mind defense. And since the defendant didn’t testify, there is no evidence that he, in fact, accidentally did anything.” Defense counsel countered that “the circumstantial evidence can speak for itself as far as the accidental nature of the touching. I don’t think my client needs to get on the witness stand and waive his constitutional right not to testify in order to say it was an accident. I think that the evidence—the state of the case right now—the state of the evidence right now can certainly show that, at least, some of these touchings were accidental in nature. And that is the basis of our defense.” Defense counsel contended the instruction would apply “to all the counts.”

Nevertheless, defense counsel later argued the accident instruction would not apply to counts 4 or 6: “So I would request that the accident instruction [not] apply to Count 4 or Count 6.” The court ruled it would give CALCRIM No. 3404 only with respect to counts 1 and 3. Defense counsel argued during closing argument that, to the extent the acts occurred, they were accidental.

⁸ The bench notes actually provide the court has no sua sponte duty to instruct on accident.

CALCRIM No. 3404, as given by the court read: “The defendant is not guilty of Counts 1 and 3 if he acted without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of Counts 1 and 3 unless you are convinced beyond a reasonable doubt that he acted with the required intent.”

The defense of mistake appearing in CALCRIM No. 3404 is a pinpoint instruction that the trial court is only required to give upon request by the defendant. (*People v. Anderson* (2011) 51 Cal.4th 989, 998.) Pinpoint instructions must only be given if supported by substantial evidence. (*People v. Enraca* (2012) 53 Cal.4th 735, 760.)

The People maintain defendant forfeited or invited any error by withdrawing his request that the court instruct the jury on mistake as to count 6. We agree. Defendant’s failure to request, or in this instance, his withdrawal of his previous request for instruction with CALCRIM No. 3404, forfeited any claim of error that the court should have instructed the jury with the accident instruction on count 6. (*People v. Jennings* (2010) 50 Cal.4th 616, 674-675.) Similarly, defendant has no cause to complain because he invited the error. “The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.’ [Citation.]” (*People v. Bailey* (2012) 54 Cal.4th 740, 753.) Here, defendant requested the court not instruct the jury with CALCRIM No. 3404 with respect to count 6; thus, he invited any error.

With respect to count 2, we hold the court committed no error in refusing to instruct on accident because substantial evidence did not support the request. M.G. testified she was at lunch watching a basketball game standing beside defendant. Defendant suddenly grabbed her arm and started rubbing her “boobs” over her clothing. She believed he did it more than one time. It made her feel uncomfortable. No evidence, either direct or circumstantial, was adduced below to support a contention the act was accidental. Speculation is not sufficient evidence to warrant the instruction. (See *People v. Moore* (2011) 51 Cal.4th 386, 409 [speculation not sufficient to warrant instruction on lesser included offense].)

We disagree with the People’s assertion below that in order to support defendant’s request for instruction with CALCRIM No. 3404, defendant would have had to have testified himself. Substantial evidence for the instruction could have been adduced had the victim testified it was possible the act was accidental, or had another percipient witness testified the incident could have been accidental. However, there was no evidence to support the instruction.

B. UNANIMITY INSTRUCTION

Defendant maintains the trial court erred in failing to give CALCRIM No. 3500, the unanimity instruction, sua sponte with respect to count 5. The People concede the court erred in failing to give the unanimity instruction, but contend any error was harmless. We agree with defendant the court committed prejudicial error in failing to instruct the jury with CALCRIM No. 3500.

A criminal defendant is entitled to a verdict in which all 12 jurors concur as a matter of due process under the state and federal Constitutions. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) In any case in which the evidence would permit jurors to find the defendant guilty of a crime based on two or more discrete acts, either the prosecutor must elect among the alternatives or the court must require the jury to agree on the same criminal act. “[C]ases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ [Citation.] . . . ‘The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.’ [Citation.]” (*Id.* at p. 1132.) Where it is warranted, the court must give the instruction sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) The omission of a unanimity instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another. (*Russo*, at p. 1133.)

“[W]hen there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing

a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.” (*People v. Jones* (1990) 51 Cal.3d 294, 322.) Nevertheless, cases generally hold the omission of a unanimity instruction harmless if the record reveals “no rational basis, by way of argument or evidence, by which the jury could have distinguished between [the acts which would constitute the offense].” (*People v. Deletto* (1983) 147 Cal.App.3d 458, 473; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1450.) “In contrast, if there is a rational basis on which jurors could distinguish between alternative factual bases, omission of a unanimity instruction is normally reversible error.” (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1589.)

Here, A.B. testified to two or three separate incidents each of which could have subjected defendant to conviction on count 5. Unlike cases in which the prosecution adduces evidence of repeated, identical incidents of sexual abuse, the acts adduced in the instant case with respect to count 5 were readily distinguishable. A.B. testified that on one occasion while she was walking to her classroom, defendant repeatedly placed his hand on her butt. On another occasion, defendant put his hand on her shoulder, potentially attempting to put his hand inside her shirt. A third incident occurred when defendant was holding her hand and placed it on his penis. The People argued during closing that all three incidents could subject defendant to conviction on count 5: “Count 5, [A.B.] What was the touching with her? Taking her hand and placing it on his penis. . . . Touching her thigh, her buttocks, touching her chest near her breast.”

Thus, because there were several distinct acts, each of which could have subjected defendant to conviction on count 5, either the People should have selected one act to submit to the jury for deliberation or the court should have instructed the jury with CALCRIM No. 3500. Because neither occurred, there is a danger that some of the jurors could have believed defendant committed one of the acts while other jurors believed he committed another. Therefore, it is possible the jury did not unanimously agree on one act of misconduct, but conglomerated the acts to convict defendant on the basis that he did “something” wrong.

Contrary to the People’s argument, the error is not harmless simply because defendant offered the same defense to each offense, i.e., he did not commit them. In *People v. Carrera* (1989) 49 Cal.3d 291, the court held that a unanimity instruction was unnecessary where the defendant, charged with one offense, offered the same defense to a robbery committed against two individuals *at the same time*. (*Id.* at pp. 311-312; cited in *People v. Jennings, supra*, 50 Cal.4th at p. 679.) Thus, the *Carrera* “exception” would apply only where the jury could not have found a defendant committed one act without committing the other. (*Carrera*, at pp. 311-312.) Here, as discussed *ante*, the jury could have determined that defendant committed one of the incidents, but not all three. The court prejudicially erred in failing to instruct the jury with CALCRIM No. 3500.

DISPOSITION

Defendant's conviction on count 5 is reversed. In all other respects, the judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

KING
J.