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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.

LUIS REY ADAME,

Defendant and Appellant.

E064719

(Super.Ct.No. RIF1406197)

OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Luis Rey Adame appeals from judgment entered following jury convictions for three counts of committing a lewd act on a child under the age of 14 years (counts 1, 2, and 3; Pen. Code, § 288, subd. (a)).¹ In a bifurcated trial, the court also found true allegations that defendant had a qualifying prior conviction under the Habitual Sex Offender law,² a qualifying prior conviction under the One Strike law,³ two qualifying prior convictions under the Three Strikes law,⁴ and a qualifying serious prior conviction.⁵ The trial court sentenced defendant to a prison term totaling 230 years to life.

Defendant contends he received ineffective assistance of counsel (IAC) based on his attorney's failure to request a jury instruction on accident as a defense to count 3. We conclude that, even assuming without deciding the accident instruction should have been given, there was no prejudicial error. The judgment is affirmed.

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

² Section 667.71, subdivision (c)(4).

³ Section 667.61, subdivision (d)(1).

⁴ Sections 667, subdivisions (c), (e)(2)(A), and 1170.12, subdivision (b).

⁵ Section 667, subdivision (a)).

II

FACTUAL AND PROCEDURAL BACKGROUND

Jane Doe, born in 1998, lived with her two siblings and mother (mother). In 2004, mother met defendant and began dating him a few years later.

Meanwhile, in April 2007, defendant lived with another family which included Jane Doe 2, born in 1996, and Jane Doe 2's two brothers, and Jane Doe 2's mother. Defendant molested Jane Doe 2 on two separate occasions in April 2007, when Jane Doe 2 was 11 years old. Jane Doe 2 testified at trial in the instant case that, during one incident, after Jane Doe 2 flushed the toilet, defendant entered the bathroom, pulled down her pants and underwear, rubbed her genital area with his hand, and inserted his finger into her vagina, causing pain. A couple of weeks later, defendant did the same thing, with the exception he did not insert his finger in her vagina. Before those incidents, defendant on numerous occasions rubbed and squeezed Jane Doe 2's buttocks with his hand. Eventually Jane Doe 2 told her grandmother about the touchings. Her grandmother reported the molestation to the police.

In 2007 or 2008, as a realtor, defendant assisted Jane Doe's mother in purchasing a home in Moreno Valley. At the time, mother was dating defendant. Defendant frequently came over to mother's home but did not spend the night.

In May 2009, mother and defendant married. Jane Doe was 11 years old and seemed to have a good relationship with defendant. After marrying mother, defendant spent the night at mother's home only once or twice a week. He also visited during the

day about four times a week. The rest of the time he stayed at his brother's house in Perris.

In June or July 2009, defendant's attitude and demeanor changed. He became angry at mother's children and complained they were undisciplined. Defendant threatened to have mother and Jane Doe deported and told them he "owned" them. Jane Doe's behavior also changed. She became withdrawn, very quiet, and very depressed. She did not want anyone to touch her, was no longer affectionate, and became easily irritated. Jane Doe's grades went down.

Jane Doe testified at trial that in 2009, after mother and defendant married, defendant molested her on four occasions, all within a couple of months. The first time was while Jane Doe, defendant, mother, and Jane Doe's brothers were having their picture taken at the Disneyland entry gates. While defendant was standing next to Jane Doe, defendant put his arm around her upper torso and then slid his hand down to her buttocks.

The second molestation occurred when Jane Doe was sitting on the couch at home, watching television. Defendant entered the room, sat down next to her, placed his hand on Jane Doe's thigh, and then moved his hand up toward her "private area." Defendant moved his hand as if he were trying to put it in her shorts.

The next time defendant molested Jane Doe was when she was at home, standing at the bottom of the staircase, using the intercom. As defendant was walking down the stairs, he "threw himself on" Jane Doe and "grabbed onto" Jane Doe. When he grabbed Jane Doe, he put his hand over her breast, grabbed at her waist, and then said, "thanks."

Defendant was behind Jane Doe. Her back was toward defendant. He reached over Jane Doe's back when he grabbed her, and crossed his arms across her chest, with his right hand on her left breast and his left arm crossing his right arm. Jane Doe tried to push defendant off her. Finally, defendant let go of her. After defendant pulled away, Jane Doe noticed defendant's face had a very stern and menacing expression. He did not say anything.

The final molestation incident occurred when Jane Doe was in her bedroom. When she heard defendant coming up the stairs, Jane Doe hid in her closet, because defendant had been acting aggressive and mean. Defendant opened the closet door. Jane Doe crouched in the corner of the closet, fearing defendant would touch her. Jane Doe started crying because she was scared. Defendant put his hand down her shirt, squeezed her breast, and tried to force Jane Doe to kiss him. Jane Doe said, "Don't touch me. [D]on't touch me." Defendant told her to be quiet and pressed his lips against hers. He abruptly left when he heard someone come up the stairs. He told her not to say anything if she knew what was good for her. Jane Doe did not tell mother about the molestation because Jane Doe thought she might be blamed for it. She also feared her family might be physically harmed and deported.

By December 2009, defendant spent very little time with mother and her children, most likely in part because in November 2009, defendant was convicted of committing a lewd act and sexual penetration against Jane Doe 2 (§§ 288, subd. (a), 289, subd. (j)), and was sentenced in March 2010, to three years in jail.

In 2014, during Jane Doe's freshman year in high school, she attempted suicide. She was hospitalized and referred to a therapist. Mother took Jane Doe to Dr. Navarro, a psychologist. During counseling sessions with Dr. Navarro, Jane Doe disclosed for the first time the sexual abuse. Dr. Navarro told mother he was required to report Jane Doe's disclosure of sexual abuse.

Dr. Thomas, a psychiatrist and expert on child sexual abuse, testified in the instant case that child abuse victims do not normally show disdain for their abusers, and often do not disclose they have suffered sexual abuse or do not do so right afterwards for a variety of reasons, including confusion, humiliation, and fear of harm to themselves, their family or the perpetrator.

In December 2014, defendant was charged with sexually abusing Jane Doe. The amended information also alleged defendant had two priors, consisting of the two prior convictions for sexually abusing Jane Doe 2, and defendant qualified as a habitual sexual offender (§ 667.71, subd. (c)(4)).

The trial court dismissed the count alleging defendant committed a lewd act against Jane Doe while at Disneyland, because the incident occurred outside the jurisdiction of the Riverside County Superior Court. Another count was also dismissed based on a finding of insufficient evidence. The remaining three counts were based on the three molestation incidents defendant committed against Jane Doe at her home in 2009. The jury found defendant guilty of all three counts. In a bifurcated trial, the court also found that defendant qualified as a habitual sexual offender, and found true the two prior convictions for sexually abusing Jane Doe 2.

III

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends he received IAC based on his attorney's failure to request a jury instruction on accident as a defense to count 3. Count 3 is based on allegations defendant fondled Jane Doe's breast while she was standing at the base of the stairs by the intercom panel, which she was using when defendant grabbed her.

A. *Applicable Law Regarding IAC*

“In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [(*Strickland*)].) Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 214-215; in accord, *People v. Majors* (1998) 18 Cal.4th 385, 403.)

In determining whether there is prejudice under *Strickland*, we must ask whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.) A “reasonable probability” is less than a preponderance: “the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the

errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” (*Ibid.*) In making this determination, we must assess the “totality of the evidence.” (*Id.* at p. 695.)

B. Harmless Error

There is no need to determine whether defense counsel’s failure to request an accident instruction constitutes constitutionally deficient representation, because defendant’s IAC claim can be resolved solely on the basis of the prejudice prong of the *Strickland* test. (*In re Jackson* (1992) 3 Cal.4th 578, 604.) “As the United States Supreme Court explained in *Strickland v. Washington, supra*, 466 U.S. 668, 697 ‘a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.’” (*Jackson*, at p. 604.)

Defendant argues defense counsel’s failure to request an accident instruction constitutes prejudicial error because, had the instruction been given, the jury might have found that defendant accidentally fell down the stairs and inadvertently grabbed Jane Doe’s breast. CALCRIM No. 3404 states in relevant part: “[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.]”

The accident instruction, CALCRIM No. 3404, is based on section 26, subdivision Five, which provides a defense for “[p]ersons 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.”

A conviction for committing a lewd act on a child under the age of 14 years under section 288, subdivision (a), requires findings that the defendant “willfully and lewdly” committed “any lewd or lascivious act” upon or with the body of the victim “with the intent of arousing . . . the lust, passions, or sexual desires” of either party. (§ 288, subd. (a).) Evidence of sexual motivation is required. (*People v. Martinez* (1995) 11 Cal.4th 434, 449 (*Martinez*).

Our high court in *Martinez* noted that “[t]he additional requirement of a ‘lewd or lascivious act’ seems redundant Nothing in the ordinary meaning of this phrase refers to particular forms of physical contact or sexual activity. In addition, the statute specifically prohibits contact with ‘any part’ of the victim’s body. (§ 288, subd. (a).) . . . [W]e can only conclude that the touching of an underage child is ‘lewd or lascivious’ and ‘lewdly’ performed depending entirely upon the sexual motivation and intent with which it is committed.” (*Martinez, supra*, 11 Cal.4th at p. 449.)

As explained in *Martinez*, “[T]he courts have long indicated that section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the ‘gist’ of the offense has always been the defendant’s intent to sexually exploit a child, not the nature of the offending act. [Citation.] ‘[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent

with which the act was done. . . . If [the] intent of the act, *although it may have the outward appearance of innocence*, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute’ [Citation.]” (*Martinez, supra*, 11 Cal.4th at p. 444.)

Defendant argues that there was substantial evidence that defendant’s touching Jane Doe on the stairway was accidental based on her testimony that, as he was descending the stairs, he threw himself at her and expected her to break his fall and hold him up. He threw his arms across her from behind, crossed them across her chest, and grabbed her left breast with his right hand. Jane Doe exclaimed, “What are you doing?” Defendant pulled away, grabbed her waist, said, “Oh, thanks,” and gave Jane Doe a stern, menacing look. Defendant argues the jury could have reasonably construed Jane Doe’s testimony as supporting a finding the touching was accidental, not an intentional lewd act.

Even assuming Jane Doe’s testimony was sufficient to support an instruction on accident, the trial court was not required to give the instruction sua sponte (*People v. Anderson* (2011) 51 Cal.4th 989, 997-998), and defense counsel’s failure to request it was not prejudicial error because it is not reasonably probable that, but for counsel’s omission, the result of the proceeding would have been any different. (*Strickland, supra*, 466 U.S. at p. 694.) We conclude this for a number of reasons. First, the jury was instructed that convicting defendant of count 3 required a finding defendant’s touching of Jane Doe was willful, purposeful and intentional.

The trial court instructed the jury in relevant part that, “To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully touched any part of a child’s body either on the bare skin or through the clothing; [¶] 2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; [¶] AND [¶] 3. The child was under the age of 14 years at the time of the act. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.” (CALCRIM No. 1110.) This instruction explicitly requires a finding the defendant committed the touching with the intent of arousing his sexual desires, thereby precluding any finding of an accidental touching. By finding defendant guilty of count 3, the jury necessarily rejected the accident defense.

Although an accident instruction was not given, the jury was well aware of the defense’s theory that the touching on the stairs was accidental. During closing argument, defense counsel argued: “If she would have moved aside, he probably would have fallen on his head. And that as he fell down, he went over her back and grabbed her breasts. . . . [T]hat seems more like an accident, because he did tell her ‘thank you’ for breaking his fall.” We note defendant only said “thank you” after grabbing Jane Doe. It was therefore unclear as to what defendant was thanking her for, particularly since, when he said it, he had a menacing expression on his face. Regardless of the remote possibility the facts could be construed as an accident, the jury was aware of the accident theory, and rejected it by finding defendant guilty of committing a lewd act against Jane Doe. There is no

reasonable probability that, had an accident instruction been given, the jury would have found defendant not guilty of count 3. (*Strickland, supra*, 466 U.S. at p. 694.)

Furthermore, there was overwhelming evidence supporting defendant's count 3 conviction. Jane Doe's detailed description of how the incident occurred and the manner in which defendant grabbed her provided compelling evidence that defendant touched Jane Doe with the intent of arousing his sexual desires. There was also evidence defendant molested Jane Doe 2, and had committed several other instances of molesting Jane Doe within four months of the stairway incident. Therefore, any failure to request an accident instruction was harmless beyond a reasonable doubt. And because defendant can show no prejudice from the absence of an accident instruction, we reject his claim that defense counsel was ineffective for failing to request the instruction. (*Strickland, supra*, 466 U.S. at p. 687.)

Defendant's reliance on the federal cases, *Pirtle v. Morgan* (9th Cir. 2002) 313 F.3d 1160, *United States v. Alferahin* (9th Cir. 2006) 433 F.3d 1148, and *United States v. Span* (9th Cir. 1996) 75 F.3d 1383, in support of his IAC challenge is misplaced. These cases are not on point. They do not concern an IAC challenge based on the failure to request an accident instruction. Furthermore, federal district and appellate court decisions are not binding on this court, and the three cited cases do not provide persuasive support because they are distinguishable and not on point. (*People v. Zapien* (1993) 4 Cal.4th 929, 989, *People v. Uribe* (2011) 199 Cal.App.4th 836, 875.)

IV
DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.