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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MATILDE ESPINOZA-RODRIGUEZ,

Defendant and Appellant.

F064734

(Super. Ct. No. SF016219A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Caely E. Fallini, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Jose Matilde Espinoza-Rodriguez appeals following his conviction on two counts of lewd and lascivious acts with a child under the age of 14 years. He contends the trial

court erred by failing to sua sponte instruct the jury on the lesser included offense of attempted lewd and lascivious acts as it pertains to count 2. We agree.

RELEVANT PROCEDURAL BACKGROUND

In an information filed by the Kern County District Attorney on August 1, 2011, defendant was charged with two counts of lewd and lascivious acts with a minor. (Pen. Code,¹ 288, subd. (a).) It was further alleged the offenses were committed against more than one victim. (§ 667.61, subd. (b).) On August 8, 2011, defendant pled not guilty to all counts and denied all allegations.

After defendant rejected an offer by plaintiff to plead to one count and agree to a prison term of three years, a jury trial was had.² Defendant was convicted of both counts. The jury also found true the special allegations.

On April 6, 2012, after denying a motion for new trial, the trial court sentenced defendant to 15 years to life on count 1, and a concurrent 15 years to life term on count 2. Various fines, fees and assessments were also imposed.

BRIEF SUMMARY OF FACTS³

On May 14, 2011, 12-year-old Margarita R.'s family celebrated her younger brother's birthday. Defendant, a relative, came with his wife Deana, their infant son, and Deana's daughter Stephanie. Margarita and Stephanie were close friends, often spending the night at one another's home.

Later that evening, defendant left the birthday party, leaving behind Deana and the children. Deana was upset with him. It was decided Margarita would stay the night with Stephanie, and the two girls headed to defendant's home with Deana and the baby. Once

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

²The probation office's report reflects defendant was 21 years old at the time of the alleged offenses and had no known prior criminal record.

³A detailed summary of the facts is not necessary in light of the issue on appeal. Where appropriate, the testimony offered and evidence adduced at trial will be referenced with specificity in this court's discussion.

there, the girls visited, made a bed with pillows and blankets in the living room, and lay down to watch television. Deana was in her room with the baby. Defendant was not present. Eventually the girls fell asleep in the living room.

At some point, Margarita awoke because she felt a pinch on her left breast. Then she felt someone pull her shirt down and suck on her breast. She was afraid and did not know what to do. The person then touched or rubbed her right thigh. She pushed the person away. She then realized it was defendant. Defendant had been lying between the two girls. He got up and left the room. Margarita called out to Stephanie and began to cry. Stephanie began to cry as well.

While 11-year-old Stephanie initially told investigating officers that defendant touched her on the side of her upper torso, at trial she testified defendant “tickled” her to move over. Stephanie testified that when she woke up, defendant was lying between her and Margarita, he had done so on previous occasions, and that he tickled her in an effort to get her to move over. Stephanie denied saying defendant had touched her leg; rather, she continued to maintain he was about to touch it. She claimed her statements to the investigating officer were conflicting because she “was really nervous that day” and had never been to a police station before. Defendant did not touch her inappropriately and she did not see him do anything to Margarita.

DISCUSSION

On appeal, defendant argues the trial court was obligated to instruct the jury on the lesser included offense of attempted lewd and lascivious conduct as to count 2, the count pertaining to Stephanie. More particularly, he contends Stephanie’s testimony established that he touched her on the side or under her arm in an effort to get her to move over and, hence, he had no intent to arouse himself or Stephanie. Therefore, he asserts the trial court’s failure to instruct was prejudicial error requiring reversal of his conviction in count 2, as well as a reversal of the multiple victim enhancement.

An offense is necessarily included within a charged offense if the greater offense cannot be committed without also committing the lesser offense. (*People v. Lopez* (1998))

19 Cal.4th 282, 288.) An attempt to commit a charged crime is a lesser included offense to the completed crime. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609.) The trial court has a sua sponte duty to instruct the jury on a lesser included offense when substantial evidence, viewed in the light most favorable to the defendant, warrants such an instruction. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5.) However, a “court is not obliged to instruct on theories that have no such evidentiary support.” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) “In deciding whether evidence is ‘substantial’ in this context, a court determines only its bare legal sufficiency, not its weight.” (*Id.* at p. 177.) “[I]f there is no proof, other than an unexplainable rejection of the prosecution’s evidence, that the offense was less than that charged, such instructions [on lesser included offenses] shall not be given.” [Citations.]” (*People v. Friend* (2009) 47 Cal.4th 1, 51–52.)

Error in failing to instruct on a lesser included offense is judged under the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) standard of prejudice. “A conviction of the charged offense may be reversed in consequence of this form of error only if, “after an examination of the entire cause, including the evidence” [citation], it appears “reasonably probable” the defendant would have obtained a more favorable outcome had the error not occurred.” (*People v. Lasko* (2000) 23 Cal.4th 101, 111.) “Probability under *Watson* ‘does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.’” (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.) “In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.” (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

Here, Stephanie’s testimony at trial was substantial evidence, when viewed in the light favorable to the defense, that warranted an instruction on attempted lewd and lascivious conduct. (*People v. Turk, supra*, 164 Cal.App.4th at p. 1368.) Stephanie

testified defendant tickled her, something he had done many times before in a playful manner, in an effort to get her to move over. If the jury believed Stephanie's testimony, it could have found defendant did not have the requisite intent to arouse either himself or Stephanie. Additionally, Stephanie testified consistent with her recorded statement that defendant never touched her leg. Instead, she said he was about to touch it, but either he removed his hand or she pushed it away. As to this conduct, assuming defendant had the requisite intent as found by the jury, his crime was one of attempt because he took a direct but ultimately ineffectual act toward completion of the greater crime. (*People v. Memro* (1985) 38 Cal.3d 658, 698, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) In sum, had Stephanie's version of events been accepted by the jury, it would have absolved defendant from guilt of the greater offense. Therefore, we find the trial court's failure to instruct the jury on attempt as to count 2 was error.

Error of this sort is subject to the *Watson* standard. Thus, we consider whether it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Watson, supra*, 46 Cal.2d at p. 836; see also *People v. Breverman, supra*, 19 Cal.4th at p. 165.) As previously noted, in making this determination, "an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome so *comparatively* weak, that there is no reasonable probability the error of which defendant complains affected the result." (*People v. Breverman, supra*, at p. 177.)

We disagree with plaintiff's contention the error should be found harmless. As to whether defendant touched Stephanie with a lewd intent, the evidence was fairly well balanced. She testified defendant tickled her when he touched her—something he had done many times before in a playful manner—to get her to move over. The only evidence this touching was possibly done with lewd intent was Stephanie's police interview statement. We have reviewed the DVD video of this taped statement.

Although it provides substantial evidence to support a section 288 conviction based on appellate review standards, we find it is not particularly strong evidence. Nor was the evidence supporting an attempted section 288 comparatively weak. Rather, if the jury were given the opportunity to convict defendant of an attempted section 288 offense, there was a reasonable chance, and more than an abstract possibility, it would have done so or would have hung on the charge in count 2. (*People v. Racy, supra*, 148 Cal.App.4th at p. 1335.) The tenor of the interview appears to be Stephanie's concern for defendant's touching of Margarita, who Stephanie referred to as her "cousin," and his attempt to touch Stephanie's leg.

Although plaintiff relies heavily on the evidence defendant touched Stephanie on her side *under her shirt*, this evidence was equivocal, and the jury could easily have rejected it. Below we set forth the pertinent parts of the interview statement:

“[OFFICER GUSTAVO] OLVERA: Okay so tell me a little bit of what's going on, okay.

“STEPHANIE: Um, well um like we were asleep and um, well [Jose] came like at 1:00, 2:00 in the morning. [¶] ... [¶]

“OLVERA: Okay. Were you guys asleep in the living room?

“STEPHANIE: Yeah.

“OLVERA: Okay. Um, were you awake when he got home?

“STEPHANIE: No, I wasn't awake. I was asleep.

“OLVERA: You were asleep? Okay, so how did you know he did that?

“STEPHANIE: I saw him.

“OLVERA: Okay and what did you see him do?

“STEPHANIE: Like *I saw him like touching my cousin* but like I was afraid if I screamed out my Mom said he will do something to me.

“OLVERA: Okay. Did he touch you?

“STEPHANIE: Yeah.

“OLVERA: Did he touch you before he touched her?

“STEPHANIE: Yeah.

“OLVERA: And when he touched you, what did he do to you or how did he touch you?

“STEPHANIE: Like touched me here [indicating her right side] and touched me—he was about to touch me in my leg but I moved his hand.

“OLVERA: Okay.

“STEPHANIE: And so, and *then he went to go touch my cousin* and then after he touched my cousin well because he was, she was calling my name and then he left running to the room.

“OLVERA: Okay.

“STEPHANIE: And so she’s like, ‘Oh I want to go home. I want to go home.’ And so after she said that I turned on the light and we, and she started crying and then he came, like he came to the living room.

“OLVERA: Okay. But before, when he, when you woke up, you said you were asleep.

“STEPHANIE: Hmm hmm.

“OLVERA: And you felt him touching you.

“STEPHANIE: Uh huh.

“OLVERA: Where was he touching you at?

“STEPHANIE: Right here.

“OLVERA: On the side?

“STEPHANIE: Yeah.

“OLVERA: Were you asleep face up or were you on your side?

“STEPHANIE: I was on my side. I was like that.

“OLVERA: Okay. And so you felt him touching you right here on the side?

“STEPHANIE: Yeah.

“OLVERA: On your right side or left side?

“STEPHANIE: Right here in my—

“OLVERA: Okay on your right side. Okay. Where else did he touch you?

“STEPHANIE: That’s all.

“OLVERA: Okay did he touch your legs?

“STEPHANIE: He was about to but I took his hand off.

“OLVERA: Okay. What kind of, what clothes did you have on? Did you have any clothes on, or pajamas or what did you have on?

“STEPHANIE: Yeah. I had pajamas.

“OLVERA: What did you have on?

“STEPHANIE: Um, my long pajamas and a shirt.

“OLVERA: Okay. And then did he take any of that clothes off?

“STEPHANIE: No.

“OLVERA: Okay. When he touched you, did he touch you under the shirt or was it over the shirt.

“STEPHANIE: *It was under the shirt.*

“OLVERA: So did he go under from your stomach or your waist up or how did he do that?

“STEPHANIE: *No, just right here.*

“OLVERA: Okay so how did he get under the shirt?

“STEPHANIE: *Well no*, like I was asleep and then I thought I was dreaming and so I would like, like this, I was like this and I pulled the blanket over my head.

“OLVERA: Was your shirt off or was it on?

“STEPHANIE: No it was on.

“OLVERA: So when, after you woke up it was still on and everything, nothing was off.

“STEPHANIE: Yeah.

“OLVERA: Okay. Did he touch you on your breasts?

“STEPHANIE: No.

“OLVERA: No. Just on the side. Okay. Um and then you said he was going to touch your legs but you took his hand off.

“STEPHANIE: Yeah.

“OLVERA: Okay. And then was, was that it or was he doing more to you.

“STEPHANIE: No. That was it.

“OLVERA: That was it. He didn't do anything else to you. Okay. So he didn't touch you on the breasts. He didn't—did he try and kiss you or did he kiss you? Did he do any of that?

“STEPHANIE: No.

“OLVERA: No. Did he touch any other parts of your body?

“STEPHANIE: No that's all. That's all.

“OLVERA: That's it.

“STEPHANIE: That's all.

“OLVERA: Has he done that to you in the past?

“STEPHANIE: No.

“OLVERA: You're sure?

“STEPHANIE: I'm sure.

“OLVERA: Okay.

“STEPHANIE: It's the first time.

“OLVERA: That was the first time he's done that. Okay. Has he tried to do anything to you in the past.

“STEPHANIE: No.

“OLVERA: Never has.

“STEPHANIE: No. Never has.

“OLVERA: Okay. So he’s never touched you in any way or sitting, or come towards you in any way or anything like that.

“STEPHANIE: No.

“OLVERA: Okay, um, so, you said you guys were asleep.

“STEPHANIE: Hmm hmm.

“OLVERA: And he comes in about 1:00 or 2:00 in the morning and then you said you’re asleep. You feel him touching you.

“STEPHANIE: Uh huh.

“OLVERA: His hand is in your right side.

“STEPHANIE: Side.

“OLVERA: On your side but not on your breast. Just on the side of your body.

“STEPHANIE: Hmm hmm.

“OLVERA: And then he tries to touch your leg but you take his hand off.

“STEPHANIE: Uh huh.

“OLVERA: And then after that, you said you took the blanket and you covered yourself.

“STEPHANIE: Hmm hmm, covered myself.

“OLVERA: And what does he do then?

“STEPHANIE: Nothing. Then he starts touching my cousin.” (*Italics added.*)

We do not find the foregoing to be particularly strong, and certainly not so relatively strong when compared to the strength of the attempt to touch Stephanie’s leg, as to make the error harmless.

On the other hand, the evidence against defendant to support his conviction for lewdly touching Margarita was very strong, corroborated by a “hickey” he left on her

breast. Defendant presented no defense except to attempt to show he was drunk when he committed the offense, and that Margarita had lied once before and thus her testimony should not be believed. When compared to the evidence presented as to count 1, the evidence on count 2 was relatively weak. The only consistency in the evidence was that defendant attempted to touch Stephanie on her leg immediately before he turned his attention to Margarita and began sucking on her left breast. Consequently, we conclude the failure to instruct on attempted section 288 as to Stephanie was prejudicial.

Defendant argues the error requires a reversal and remand for new trial of count 2 and a reversal of the multiple victim special circumstance pursuant to section 667.61. We disagree a complete reversal is required on count 2. Under section 1260, appellate courts possess the authority to modify a judgment to reflect a conviction of a lesser and included offense when the evidence warrants it. (*People v. Matian* (1995) 35 Cal.App.4th 480, 488.) “Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. [Citations.]’ [Citation.]” (*People v. Edwards* (1985) 39 Cal.3d 107, 118; *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278.) Due process concerns are not implicated when the trial court modifies the verdict to a lesser and necessarily included offense provided the evidence supports such a conviction of the lesser offense. (*People v. Matian, supra*, at p. 488.)

Here, as discussed above, the evidence supported both the attempted touching and the actual touching. The jury simply was not given the opportunity to convict on the lesser included offense instead of the greater offense. Therefore, the proper disposition is one that preserves both options. This is accomplished by giving plaintiff the option of retrying the greater offense and special circumstance allegation or accepting a reduction

to the lesser offense.⁴ (*People v. Edwards, supra*, 39 Cal.3d at p. 118 [instructional error results in modification of judgment to lesser offense with retrial option]; *People v. Moretto, supra*, 21 Cal.App.4th at pp. 1278-1279 [same]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1596 [same].)

DISPOSITION

The section 288 conviction in count 2 is reversed, the section 667.61 enhancement is ordered vacated and the matter is remanded with these directions: If plaintiff does not bring defendant to trial within 60 days after the filing of the remittitur in the trial court pursuant to section 1382, subdivision (a)(2), the trial court shall proceed as if the remittitur constitutes a modification of the judgment to reflect a conviction in count 2 of attempted section 288 and shall resentence defendant accordingly. In all other respects, the judgment is affirmed.

PEÑA, J.

WE CONCUR:

GOMES, Acting P.J.

FRANSON, J.

⁴An attempted section 288 conviction does not qualify for sentencing under the one strike law embodied in section 667.61. (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 217.)