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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BUTCH LEE EDELMAN,

Defendant and Appellant.

G048463 consol. w/ G048464

(Super. Ct. Nos. 08HF0336 &
09NF0760)

O P I N I O N

Appeals from a judgment and order of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Rex Adam Williams, 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, Peter Quon, Jr., and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

Butch Lee Edelman appeals from a judgment after a jury convicted him of two counts of lewd act upon a child under 14 years old and two counts of misdemeanor child annoyance. He also appeals from an order revoking his probation. Edelman argues the trial court erred in admitting evidence and erred in sentencing him. His contentions are meritless, and we affirm the judgment and order.

FACTS

I. Case No. 08HF0336

On March 19, 2008, pursuant to a plea agreement, Edelman pleaded guilty to six counts of forgery (Pen. Code, § 470, subd. (d)). The trial court suspended imposition of sentence and placed him on three years of formal probation with probation terms and conditions.

II. Case No. 09NF0760¹

In December 2008, six-year-old Kianna S. frequently visited her grandfather so she could go to church with him. Kianna's sister and brother accompanied her occasionally. Kianna spent Saturday night at her grandfather's home and went to church with him the next day. Kianna slept with her grandfather in his bedroom.

Edelman and his girlfriend rented a bedroom at Kianna's grandfather's home. Edelman played with Kianna and her siblings. On one occasion, Edelman played a spinning game with them on the kitchen floor. Kianna laid in a fetal position while Edelman kneeled next to her. Edelman put one hand on her vagina, over her clothes, and his other hand on her head. He spun her by pushing her leg and head. She asked him to stop when she became dizzy and watched him spin her sister and brother.

On another occasion, Kianna and another family member wrestled with Edelman in his bedroom. Edelman sat on his bed as they jumped on the bed and played with him. As they wrestled, Edelman tried to pull down Kianna's pants.

¹ We include only the facts relevant to the offenses for which Edelman was convicted.

Another time, Edelman showed Kianna two videos on his cellular telephone and told her to tell him whether the videos were “good.” One video showed Edelman and his girlfriend having anal sex. The other video showed his girlfriend masturbating him. When Kianna asked Edelman what was in the video, Edelman exposed his penis. Kianna looked away. Edelman told Kianna not to tell anyone about the videos.

Edelman showed Kianna his penis on another occasion when they were in his bedroom. Kianna’s fear prevented her from reporting Edelman’s conduct.

On January 14, 2009, Orange County Probation Officer Andrew Parker visited Edelman at work. Parker asked Edelman about where he lived and whether he interacted with his roommate’s grandchildren. Edelman stated he knew who Parker was talking about and admitted he touched one of the children’s buttocks when they were playing. When Parker asked Edelman if the physical contact sexually excited him, Edelman said, “Yes.” Parker contacted the Anaheim Police Department. When Officer Kacey Costa and her partner arrived, Parker told them what Edelman said. Costa and her partner went to Edelman’s residence and spoke with Kianna’s grandfather to get contact information for his grandchildren. The officers went to Kianna’s home, informed her parents they wanted to determine whether their daughters had been touched inappropriately, and interviewed Kianna and her sister.

Kianna told Costa that she had not been touched in her “private areas” by anyone, including Edelman. Costa informed Kianna’s parents that Kianna said there had not been any inappropriate touching. The officers returned to Edelman’s residence and found him sitting in the back of Parker’s car. After Costa advised Edelman of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Edelman admitted he had a problem with touching children, had a sexual fascination with children, and was sexually excited by seven- to eight-year-old girls but did not know why. Edelman also said that about two weeks earlier when he wrestled with one of his roommate’s granddaughters, he

intentionally flipped the child over and touched her buttocks. He stated the child was about eight years old, her name started with the letter “K,” and she was visiting her grandfather. Edelman admitted he intentionally flipped the child over to touch her buttocks and to become aroused. Costa arrested Edelman.

The next day, Maria Chavarria, Kianna’s grandmother with whom she lived and was close to, told Kianna that she could tell her if anyone touched her. Kianna initially said Edelman had not touched her inappropriately. Kianna’s eyes became real big, which indicated she was scared. Chavarria asked Kianna if anyone touched her. Kianna told Chavarria that when she was at her grandfather’s house, Edelman touched her between her legs during a spinning game, he tried to pull down her pants when they were wrestling, and he showed her his penis twice. Kianna also said Edelman showed her a video depicting his penis and his girlfriend’s “butt” and he told her to keep the video a secret. Chavarria informed Kianna’s parents what Kianna told her.

The following day, Kianna, her mother, and Chavarria went to the Anaheim Police Department and talked to Officer Connie Najmulski. Kianna told Najmulski that as Edelman spun her around, he touched her vagina outside her pants, he tried to pull down her pants as they wrestled, he showed her a video of his penis and girlfriend’s buttocks, he showed his penis to her, and he told her not to tell anyone.

One week later, a social worker from the Orange County Child Abuse Services Team (CAST) interviewed Kianna. Kianna told the social worker that when she was six years old Edelman touched her vagina over her clothes on two separate occasions—once during the spinning game and once when they wrestled. Kianna also told the social worker that Edelman showed her two videos on his cell phone—one showing his girlfriend moving her hands up and down on his penis and another showing his penis inside his girlfriend’s buttocks. Kianna also said Edelman showed her his penis twice—once after he showed her the video and she asked him “what was that[,]” and another time when he asked her if his penis was big, and she said, “No.” Using stuffed

animals, Kianna demonstrated how Edelman touched her vagina and exposed his penis. The social worker also interviewed Kianna's sister. Kianna's sister told the social worker that during the spinning game, Edelman touched her and her siblings' "private part."²

III. Trial Court Proceedings

In January 2009, a petition for arraignment on probation violation alleged Edelman violated probation. The petition alleged Edelman violated the law: Penal Code section 288, subdivision (a); and the Anaheim Municipal Code, in an unrelated matter. It also alleged he possessed blank checks and was terminated from sex offender therapy in violation of probation. The trial court revoked Edelman's probation.

The next year, an amended information charged Edelman with the following offenses against Kianna: lewd act upon a child under 14 years old—spinning game in kitchen (Pen. Code, § 288, subd. (a)) (count 1); lewd act upon a child under 14 years old—wrestling in bedroom (Pen. Code, § 288, subd. (a)) (count 2); misdemeanor child annoyance—showing video on cell phone (Pen. Code, § 647.6, subd. (a)(1)) (count 3); and misdemeanor child annoyance—exposing himself (Pen. Code, § 647.6, subd. (a)(1)) (count 4). The information also charged Edelman with lewd act upon a child under 14 years old (Pen. Code, § 288, subd. (a)) (counts 5, 6 & 7), against three other victims. The information alleged Edelman had substantial sexual conduct with a child under 14 years old (Pen. Code, § 1203.066, subd. (a)(8)) (counts 1, 2, 5 & 7).

Before trial, the prosecutor filed a trial brief that included a motion to admit evidence of prior sexual offenses pursuant to Evidence Code section 1108,³ and Kianna's statements to Chavarria pursuant to the "fresh complaint doctrine." At a hearing on the

² Both interviews were recorded and played for the jury at trial.

³ All further statutory references are to the Evidence Code, unless otherwise indicated.

in limine motions, Edelman objected to admission of Kianna's statements to Chavarria because they were "not fresh." The trial court opined Kianna's statement was likely inadmissible under the fresh complaint doctrine but possibly admissible as a prior consistent statement (§§ 1236, 791). The court reserved ruling on the admissibility of the evidence until trial.

At trial, Kianna testified Edelman touched her inappropriately during the spinning game, tried to pull down her pants while they were in his bedroom,⁴ showed her inappropriate videos on his cell phone, and exposed himself to her.

Kianna testified she did not tell anyone what Edelman had done because she was scared. She did not tell Costa about what Edelman had done because she was uncomfortable and did not want to discuss it. The prosecutor then questioned Kianna about whether she told anyone what Edelman had done to her. The prosecutor asked Kianna whether she told an officer at the police station what Edelman had done to her, and she answered, "Yes." After the trial court excused the jury for its noon recess, the court returned to the issue of the admissibility of Kianna's statements to Chavarria. The prosecutor stated her intent was to ask Kianna whether she *told* Chavarria or an officer what Edelman did but not the details. Defense counsel objected. The court ruled the evidence was not admissible as a fresh complaint but that it was likely admissible as a prior consistent statement. The court added defense counsel suggested "the seed was planted" by police and it would wait until after cross-examination to rule. When the prosecutor inquired if she could ask the generic question whether and who Kianna told to establish a timeline, the court responded the prosecutor could ask what Chavarria and the police said to Kianna because in opening statement defense counsel suggested her story was fabricated.

⁴ Kianna testified concerning this incident after refreshing her recollection with her statements to police.

Defense counsel cross-examined Kianna about the prosecutor asking her to read a piece of paper while she was testifying, and about meeting with the prosecutor before trial to “go[] over the questions that [the prosecutor] asked.” On redirect examination, Kianna testified the prosecutor did not give her all the questions and she was telling the truth.

Out of the jury’s presence, the trial court explained that when the prosecutor asked Kianna whether she was telling the truth, Kianna paused for a substantial length of time, “a good half a minute to a minute.” The court said Kianna began to cry. When proceedings resumed, the prosecutor stated she raised her voice during the last couple questions and asked Kianna whether that scared her, and she said, “Yes.” The prosecutor apologized. After the prosecutor asked Kianna why she told Costa that Edelman did not touch her, and she answered because she was scared, the prosecutor requested a sidebar discussion.

At sidebar, the prosecutor stated she wanted to question Kianna regarding “the mere fact that she told that police officer what had occurred to her.” Defense counsel stated, “there is no objection.” After the prosecutor stated she intended to question Najmulski on this subject, the trial court explained that “though it was on redirect,” the inference from Kianna’s silence and sobbing was she was not telling the truth, although the prosecutor subsequently tried to clarify Kianna was upset because the prosecutor raised her voice. The prosecutor stated she intended to ask Kianna, “Did you tell the police officer what [Edelman] had done to you.” Defense counsel stated there was no objection. When proceedings resumed, Kianna testified she truthfully told a police officer what Edelman had done to her. Kianna also said she told a social worker what he had done to her.

Chavarria testified Kianna told her what Edelman had done to her as described above. On cross-examination, Chavarria admitted that when she spoke to Kianna, Chavarria knew Kianna had previously told her mother that Edelman had never

touched her inappropriately. She also admitted Kianna initially told her that Edelman had not touched her inappropriately.

Najmulski testified she interviewed Kianna at the police station. She said Kianna told her that “[Edelman] touched [her] private parts[.]” The trial court overruled defense counsel’s hearsay and leading objections, and held a hearing out of the jury’s presence. The trial court inquired whether Kianna’s statements were admissible pursuant to sections 1236 and 791 as prior consistent statements. Defense counsel asserted Kianna’s statements to Najmulski were not prior to Chavarria’s and Najmulski’s repeated questioning of her. The trial court stated that although Kianna’s “pregnant pause” and sobbing was during redirect examination, defense counsel on cross-examination questioned Kianna whether she went over the questions with the prosecutor which can “trigger” section 791, subdivision (b), because her statements to Najmulski preceded defense counsel’s charge of fabrication on cross-examination. Relying on *People v. Noguera* (1992) 4 Cal.4th 599 (*Noguera*), and *People v. Andrews* (1989) 49 Cal.3d 200 (*Andrews*), overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237, 243-244, the court ruled the statements were admissible pursuant to sections 1236 and 791 as prior consistent statements. Najmulski testified Kianna told her what Edelman had done to her as described above.

Pursuant to section 1108, 18-year-old Amanda F. testified for the prosecution. She stated that in August 2002 when she was seven years old, she went to a pool party with family members. While Amanda played in the pool, Edelman, who was 15 years old, put his fingers in Amanda’s vagina. Later, Amanda was sitting at a table when Edelman sat down next to her, put his hand inside the bottom of her bathing suit, and put his fingers inside her vagina.

The parties stipulated that on September 25, 2002, Edelman admitted he touched the vagina of Amanda, who was under 14 years old, with the intent to sexually

arouse himself. During closing argument, defense counsel admitted Edelman was guilty of count 2.

IV. Jury Verdicts & Sentencing

The jury convicted Edelman of counts 1, 2, 3, and 4, and found true the substantial sexual conduct allegation true as to count 1 but not count 2. The jury acquitted Edelman of counts 5, 6, and 7, and their lesser included offenses. The trial court found beyond a reasonable doubt Edelman violated probation.

At the sentencing hearing in case No. 09NF0760, the trial court indicated it was guided by California Rules of Court, rule 4.421(a), and stated the victim was extremely vulnerable (rule 4.421(a)(3)), Edelman's prior convictions are numerous and increasingly serious (rule 4.421(b)(2)), and he was on probation at the time he committed the charged offenses (rule 4.421(b)(4)). The court imposed the upper term of eight years on count 1, and a concurrent sentence of two years (one-third the middle term) (rule 4.425(a)(1)) on count 2. The court imposed additional one-year terms on counts 3 and 4 (rule 4.425(a)(1)). The total prison term was 12 years.

In case No. 08HF0336, the trial court sentenced Edelman to eight months (one-third the middle term) on each of the six counts for a total of four years to run consecutively to the sentence in case No. 09NF0760. After stating it was not relying on case No. 09NF0760 as a basis to run the sentences consecutively, the court reasoned, "Primarily the motivating factor, the significant factor is that [Edelman] violated probation while he was on probation and his criminal history as well that I have articulated before." Edelman's total prison sentence was 16 years. Edelman appealed from the revocation of his probation and his judgment of conviction.

DISCUSSION

I. Admission of Evidence

Edelman argues the trial court erred in admitting Kianna's statements to Chavarria and Najmulski because they were not prior consistent statements within the meaning of sections 1236 and 791. We disagree.

Evidence of a statement made other than by a witness while testifying at trial, offered to prove the truth of the matter asserted, is hearsay and is inadmissible, unless there is an exception for its admission. (§ 1220.) “To be admissible as an exception to the hearsay rule, a prior consistent statement must be offered (1) after an inconsistent statement is admitted to attack the testifying witness's credibility, where the consistent statement was made before the inconsistent statement, or (2) *when there is an express or implied charge that the witness's testimony recently was fabricated or influenced by bias or improper motive, and the statement was made prior to the fabrication, bias, or improper motive.* (§§ 791, 1236.)’ [Citation.]” (*People v. Lopez* (2013) 56 Cal.4th 1028, 1066, italics added.) A trial court has wide discretion in determining the admissibility of evidence. (*People v. Karis* (1988) 46 Cal.3d 612, 637.)

Here, the trial court did not abuse its discretion in admitting Kianna's statements to Chavarria and Najmulski because defense counsel's cross-examination of Kianna raised an implied charge of fabrication. (*Noguera, supra*, 4 Cal.4th at p. 630 [“[t]he mere asking of questions may raise an implied charge of an improper motive. . . ’ and thus invoke . . . section 791”]; *Andrews, supra*, 49 Cal.3d at p. 210 [same].) Contrary to Edelman's claim, the implication Kianna's testimony was fabricated arose on cross-examination not on redirect examination, where the record supports the conclusion the prosecutor frightened Kianna when she raised her voice.

On direct examination, the prosecutor refreshed Kianna's recollection with her statements to police when questioning her about the time Edelman wrestled with her and tried to pull down her pants. Defense counsel cross-examined Kianna about the

prosecutor asking her to read while she was testifying. Counsel also cross-examined Kianna about her meeting with the prosecutor and whether she reviewed questions the prosecutor was going to ask her, to which she replied, “Yes.” Counsel’s questions suggested Kianna’s testimony was fabricated, and Kianna made her statements to Chavarria and Najmulski before defense counsel’s implied charge of fabrication. That Kianna paused and began to cry on redirect examination does not negate the fact defense counsel first raised the issue of fabrication during cross-examination. Thus, defense counsel’s implication during cross-examination Kianna’s testimony was fabricated was sufficient to satisfy section 791, and the court properly admitted Kianna’s statements to Chavarria and Najmulski.

Assuming for the sake of argument the trial court erred in admitting Kianna’s statements to Chavarria and Najmulski, Edelman was not prejudiced. The standard for prejudice for admitting hearsay under an inapplicable exception is reviewed under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*People v. Duarte* (2000) 24 Cal.4th 603, 618-619.) An appellant must show a reasonable probability that “a result more favorable to the appealing party would have been reached in the absence of the error.” (*Watson, supra*, 46 Cal.2d at pp. 836-837.)

Here, there is not a reasonable probability Edelman would have received a more favorable result had the trial court not admitted Kianna’s statements to Chavarria and Najmulski. Kianna testified in detail Edelman touched her inappropriately, exposed himself to her, and showed her extremely unsuitable videos. Kianna’s testimony was identical to her statements to the CAST social worker. Additionally, Edelman admitted to Parker that he touched one of the children’s buttocks and it sexually excited him. Edelman conceded to Costa he was sexually excited by seven- to eight-year old girls and he touched one of the girl’s buttocks to become sexually aroused. Amanda testified Edelman previously touched her inappropriately, and there was a stipulation Edelman admitted that offense in juvenile court. Finally, during closing argument, defense counsel

admitted Edelman committed count 2. This was overwhelming evidence of Edelman's guilt on all the offenses, and he was not prejudiced by any evidentiary error.

II. Sentencing

Edelman contends the trial court erred in relying on the same circumstances to impose the upper term in case No. 09NF0760 and to impose a consecutive sentence in case No. 08HF0336. To forestall a forfeiture claim, Edelman asserts defense counsel provided ineffective assistance of counsel when he failed to object to his sentence. The Attorney General, after arguing forfeiture, asserts the trial court properly sentenced Edelman. We will address the merits of Edelman's claim to forestall his inevitable ineffective assistance of counsel argument. (*People v. Turner* (1990) 50 Cal.3d 668, 708-709 [address merits to forestall ineffective assistance of counsel claim].)

“[A] single factor may be relevant to more than one sentencing choice.” (*People v. Scott* (1994) 9 Cal.4th 331, 350 (*Scott*).) For example, only a single aggravating factor is required to impose one or more upper terms or to impose one or more consecutive sentences, so long as that fact is reasonably related to each count for which it is used. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729 (*Osband*).) On the other hand, “such dual or overlapping use is prohibited to some extent.” (*Scott, supra*, 9 Cal.4th at p. 350.) Thus, a trial court cannot use a single fact both to impose the upper term and a consecutive sentence. (*Osband, supra*, 13 Cal.4th at p. 728.)

“Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if “[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.” [Citation.] Only a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation].” (*Osband, supra*, 13 Cal.4th at pp. 728-729.)

Here, the Attorney General concedes there was some “overlap” between the circumstances the trial court relied on in imposing the upper term in case No. 09NF0760

and imposing consecutive sentences in case No. 08HF0336. However, the Attorney General asserts the court relied on a third factor, Kianna's vulnerability, and resentencing is not required because it is not reasonably probable Edelman would have received a more favorable sentence. We accept the Attorney General's concession, and agree it is not reasonably probable Edelman would have received a more favorable sentence.

In imposing the upper term of eight years on count 1 in case No. 09NF0760, the trial court relied on Kianna's extreme vulnerability (Cal. Rules of Court, rule 4.421(a)(3)), in addition to Edelman's criminal history (rule 4.421(b)(2) & (b)(4)). The third factor, Kianna's vulnerability, alone was sufficient to impose the upper term on count 1, and we conclude it is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.

DISPOSITION

The judgment and order are affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.