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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.

GUSTAVO BELTRAN DIAZ,

Defendant and Appellant.

G049281

(Super. Ct. No. 11NF3722)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed as modified with directions.

David McNeil Morse, 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, Meagan J. Beale and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Gustavo Beltran Diaz of continuous sexual abuse against a minor (Pen. Code § 288.5, subd. (a); all statutory citations are to the Penal Code) and lewd act on a child under age 14 (§ 288, subd. (a)). The jury also found Diaz committed sexual offenses against more than one victim. (§ 667.61, subds. (b) & (e)(4).) Diaz contends his trial lawyer performed ineffectively by failing to object to the prosecutor's closing argument misstating the requirement of juror unanimity as it related to the lewd act offense. Assuming counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, it is not reasonably probable the verdict would have been more favorable to Diaz. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) The Attorney General agrees Diaz is entitled to 96 days of presentence conduct credit. Accordingly, we modify the judgment and order the abstract of judgment corrected to accurately reflect Diaz's presentence custody credits. In all other respects, the judgment is affirmed.

I

FACTS AND PROCEDURAL HISTORY

From February 2011 to December 2011, Diaz lived with his girlfriend, M.B., and her three children, Jocelyn (11 years old), Stephany (6 years old) and Gustavo (2 years old). The five shared a converted garage in Anaheim. Jocelyn shared a bed with Stephany. Diaz, M.B., and Gustavo slept across the room in a separate bed.

On December 14, 2011, Jocelyn disclosed to M.B.'s sister, E.G., that Diaz had been touching her on the chest and vagina. The abuse happened more than once while she was sleeping. E.G. testified she told M.B. "the girls are telling me that [Diaz] is touching them"

The next day, Detective Salvador Enriquez interviewed Diaz at the Anaheim Police Department. Diaz admitted touching Jocelyn sexually in September, October and December of 2011. He said he touched her about three times. Diaz admitted he touched Jocelyn's legs and buttocks over her clothes, and he also touched

Stephany's legs and buttocks on one occasion in September. He admitted touching Jocelyn's buttocks skin to skin, her leg, and her vagina in October. He also admitted touching Jocelyn's buttock and legs over her clothing in December.

During a Child Abuse Services Team (CAST) interview, Jocelyn reported Diaz had touched her frequently beginning in June 2011. Jocelyn would awake during the night to find Diaz touching her buttocks, chest, and vagina. When she fully awoke, Diaz ran back to his bed. The touchings occurred between 1:00 and 3:00 a.m. The first time it happened, Diaz touched Jocelyn's buttocks and immediately returned to his bed. Later the same night, he returned to the girls' bed and touched Stephany (on top of her clothing). Stephany did not wake up during this incident. Jocelyn told the CAST interviewer Diaz touched Stephany on multiple occasions but Stephany was not aware she was ever touched. Jocelyn stated her mother was sad because Diaz was in jail and became angry and stopped speaking to E.G. after she reported the abuse.

At trial, Jocelyn recanted. She testified she lied to E.G. and the police about Diaz touching her private areas. Stephany did not provide statements or testify to any abuse.

Following trial in August 2013, the jury convicted Diaz as noted above. In September 2013, the trial court imposed consecutive 15-years-to-life terms for each count.

II

DISCUSSION

A. *Ineffective Assistance of Counsel*

Diaz contends trial counsel performed ineffectively by failing to object to the prosecution's misstatement of law during closing argument. The trial court instructed the jury pursuant to CALCRIM No. 3501: "The defendant is charged with lewd act upon a child under 14 years, in count 2, sometime during the period of June 1, 2011, to December 14, 2011. The People have presented evidence of more than one act to prove

that the defendant committed this [offense]. You must not find the defendant guilty unless: one, you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; or two, you all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged.” (See *People v. Fernandez* (2013) 216 Cal.App.4th 540, 555 [jury must agree unanimously the defendant is guilty of a specific crime; when 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].)

During closing argument, the prosecutor argued: “There was a unanimity instruction that was read to you that says the People, me, have provided you with evidence of more than one act that would justify a conviction for count 2 because in this case we have touching of the vagina, touching of the butt, touching of the leg, touching of the chichis. Any one of those will sustain a conviction on count 2. You don’t have to agree on which act it is. You can agree. You can adopt what he said, and that’s one. We’re done. Or you can all say, ‘Well, I think he touched the vagina, I think he touched the butt, I think he touched the chichis.’ As long as you all agree that he did at least one of those acts, you can convict him. And that’s what the unanimity instruction means. You don’t all have to agree on the act. You can. That’s an option for you. And it would be real easy in this case just to adopt what he said, ‘Well, he said he touched her butt and her leg. We’ll take that one.’ That would be easy. But you can also say, ‘I also think he did this. I think he did this.’ As long as you all agree that at least one of those acts for this. Element 1 has been proven to you, so let’s move on to Element 2.” This was a glaring misstatement of the law. Nevertheless, defense counsel did not object.

A criminal defendant has a right to the effective assistance of counsel. (U.S. Const, 6th Amend.; Cal Const., art. 1, § 15; *Strickland v. Washington, supra*,

466 U.S. at pp. 684-685.) To show that trial counsel's performance was constitutionally defective, Diaz must prove: (1) counsel's performance fell below the standard of reasonableness, and (2) but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. (*Strickland, supra*, at pp. 684-685; see *People v. Centeno* (2014) 60 Cal.4th 659, 674-675 [reviewing court assumes defense counsel's performance fell within the wide range of professional competence and counsel's actions and inactions can be explained as a matter of sound trial strategy]; *People v. Ghent* (1987) 43 Cal.3d 739, 772 [mere failure to object to evidence or argument seldom establishes counsel's incompetence]; *People v. Huggins* (2006) 38 Cal.4th 175, 206 [where record fails to show why defense counsel failed to object, the claim of ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation].)

The record fails to show why defense counsel failed to object. But assuming no satisfactory explanation exists, the record does not demonstrate a reasonable probability the outcome of Diaz's trial would have been different. The trial court correctly instructed the jury on the elements of the lewd act offense and of the necessity for juror unanimity as to the act he committed. The trial court instructed counsels' statements during closing argument were not evidence, and that the jury must follow the law set forth in the instructions and resolve any apparent conflict between the instructions and the attorneys' comments in favor of the instructions. (*Boyde v. California* (1990) 494 U.S. 370, 384 [counsel's arguments "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law."].) When argument runs counter to instructions given to a jury, a reviewing court will ordinarily conclude that the jury followed the instructions. (See *People v. Centeno, supra*, 60 Cal.4th at p. 676.)

In any event, the evidence concerning the lewd act offense charged in count 2 was overwhelming. Jocelyn stated Diaz abused Stephany on multiple occasions, and Diaz admitted one specific act occurred. It is unreasonable to believe some jurors would have concluded Diaz abused Stephany on one of the multiple occasions described by Jocelyn but not on the occasion admitted by Diaz. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [inconceivable jurors would believe defendant did not commit both robberies].) Counsel’s failure to object to the prosecutor’s comments did not adversely affect the outcome of the trial.

B. Denial of Conduct Credits

At sentencing, the trial court declined to award Diaz conduct credits citing “section 3646 [sic 3046].” Diaz argues this was error, and the Attorney General agrees.

Section 3046 provides in relevant part, “(a) No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following: . . . (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole. [¶] (b) If two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, no prisoner so imprisoned may be paroled until he or she has served the term specified in subdivision (a) on each of the life sentences that are ordered to run consecutively.”

A person sentenced to state prison is generally entitled to custody credit for the actual number of days he spends in custody before sentencing, plus additional credit (§ 4019) for good behavior and willingness to work during time served prior to commencement of sentence. (*People v. Brewer* (2011) 192 Cal.App.4th 457, 461 (*Brewer*).) For persons convicted of certain offenses, such as Diaz, the maximum conduct credit that may be earned is 15 percent of the actual period of confinement. (*Brewer, supra*, at p. 462; § 2933.1.) Although “[p]resentence conduct credits may not be used . . . to reduce either a minimum term of [] years or a maximum term of life . . .

after defendant has served the minimum term, the Board of Prison Terms may use defendant's [conduct] credits in determining defendant's release date." (*People v. Philpot* (2004) 122 Cal.App.4th 893, 908-909; *Brewer, supra*, p. 464.) Accordingly, we agree with the parties Diaz is entitled to 96 days of presentence conduct credit.

III

DISPOSITION

The judgment is modified (§ 1260) to add 96 days of presentence conduct credit. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.