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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.

PHILLIP ALAN HARBIN,

Defendant and Appellant.

G050329

(Super. Ct. No. 09NF3698)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Sheila F. Hanson, Judge. Affirmed.

Alan Macina for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Anthony
Da Silva and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Following a bench trial, the court found Phillip Alan Harbin guilty of one count of child annoyance with a prior sex conviction in violation of Penal Code section 647.6, subdivisions (a)(1) and (c)(2).¹ The court found true an allegation that Harbin had a prior conviction for violating Penal Code section 288, subdivision (a). The court sentenced Harbin to the upper term of six years, doubled under the “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), for a total term of 12 years in prison. Harbin had been charged with three counts in addition to the count of child annoyance with a prior sex conviction, but, in a prior jury trial, the jury could not reach a verdict on any count. The trial court declared a mistrial and, during the subsequent bench trial, the court granted the prosecution’s motion to dismiss all counts except the count for child annoyance with a prior sex conviction.

Harbin contends: (1) substantial evidence does not support the conviction for child annoyance with a prior sex conviction; (2) the trial court erred by not instructing the jury in the first trial on, and not considering in the second trial, battery as a lesser included offense of child annoyance; and (3) his trial counsel was ineffective for not requesting a battery instruction at the jury trial or arguing battery at the bench trial.

In part I of the Discussion section, we conclude substantial evidence supported both requirements for a conviction for child annoyance with a prior sex conviction. In part II of the Discussion section, we conclude the trial court had no sua

¹ Penal Code section 647.6, subdivision (a)(1) states: “Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars (\$5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.” Section 647.6, subdivision (c)(2) states: “Every person who violates this section after a previous felony conviction under Section 261, 264.1, 269, 285, 286, 288a, 288.5, or 289, any of which involved a minor under 16 years of age, or a previous felony conviction under this section, a conviction under Section 288, or a felony conviction under Section 311.4 involving a minor under 14 years of age shall be punished by imprisonment in the state prison for two, four, or six years.”

sponte duty to instruct the jury on or consider battery because it is not a lesser included offense of child annoyance. Finally, in part III of the Discussion section, we conclude there was no ineffective assistance of counsel. Accordingly, we affirm.

FACTS

I.

The Handshake Incident

Harbin moved into apartment No. 45 at an apartment complex in Anaheim on December 14, 2009. He acted in ways that seemed “not normal” to the apartment manager and “creepy” to some of the children living in the complex. Harbin would sunbathe on the grass in the common area and try to talk to people as they walked past him. He offered to shake hands with children and teenagers in the complex, but they would walk away. The son of the apartment manager saw Harbin, wearing nothing but a Speedo or some kind of tight-fitting underwear, leaning against the open doorway of his apartment.

R.S. (called “Vinnie”) and his sister, M.S., lived in apartment No. 43 on the second floor of the complex. In December 2009, Vinnie was 11 years old and M.S. was nine. On or about December 16, 2009, Vinnie and M.S. walked past Harbin’s apartment while on their way to retrieve something from their father’s van. They saw Harbin in the walkway in front of them. Harbin said, “hi, my name is Phil,” and extended his hand toward Vinnie. Vinnie said, “hi, my name is Vinnie” and shook Harbin’s hand. Vinnie described the handshake as “a bit of a squeeze.”

Harbin extended his hand toward Vinnie a second time. Vinnie shook hands again with Harbin. This time, Harbin “squeezed harder” and pulled. Vinnie took a step forward in response to the pull and felt his chest area “sliding” toward Harbin. Harbin pulled Vinnie’s arm toward his waist and in the direction of his apartment door, which was open. Harbin used only one hand—his other hand remained at his side. Vinnie became scared because he “didn’t know what was going to happen” and told M.S.

to run upstairs to their apartment. Harbin, who was six feet tall, weighed 170 to 180 pounds, and was 46 years old, was taller, bigger, and older than Vinnie. Vinnie screamed and tried to kick Harbin's legs. Vinnie, with his other hand on Harbin's arm, told Harbin to "let go," and tried to pull away from him.

Vinnie testified that Harbin moved closer to his apartment door, but "[n]ot that much closer" and that Vinnie was "not really close" to the door to Harbin's apartment. When Vinnie screamed for his mother, Harbin loosened his hand a bit. Each time Vinnie yelled "mom," Harbin loosened his grip. Vinnie calmly said to Harbin, "hold on, I'm going to get something," at which point Harbin let go of Vinnie's hand and went inside his apartment. Vinnie ran upstairs to his apartment. The handshaking incident happened over just a few seconds.

Vinnie told his parents what had happened. Vinnie's father confronted Harbin and told him to "leave us alone." Harbin said, "[a]ll right" but he had not done anything.

II.

Complaints About Harbin's Behavior

The apartment manager received complaints about Harbin's behavior. Vinnie's mother looked out her kitchen window and saw Harbin sunbathing on the grass in front of the manager's office. Harbin was fondling his genitals over his clothing. She shooed her children out of the kitchen so they would not see him.

Another resident at the apartment complex, Kelly Anderson, was talking to another adult about the handshake incident while Anderson's two sons, who were then six and 10 years old, played in a nearby grassy area. Anderson saw Harbin, who was wearing only loose boxer shorts, standing in the open doorway of his apartment. Both of his hands were tucked inside the waistband of his boxer shorts. He was looking at Anderson's two boys. Anderson yelled at Harbin and started walking toward his apartment. He made eye contact with Anderson and shut the door.

The apartment manager contacted Harbin's mother, who had signed the lease, and asked her to remove Harbin from the apartment complex. Two days later, the apartment manager contacted the police because a tenant had told him that Harbin tried to pull a child into his apartment.

Anaheim Police Officer Jerad Dewald went to the apartment complex and spoke with Harbin. Dewald told Harbin a complaint had been made about his conduct with children. Harbin became upset and said, "[t]hat kid shook my hand after I introduced myself to him." Dewald asked Harbin why he squeezed the kid's hand so hard. Harbin replied, "he told me I had a weak handshake." Harbin denied trying to pull the kid into his apartment. When asked about standing outside his apartment while wearing nothing but underwear, Harbin started yelling that he had studied the law. When asked about lying in the courtyard and fondling himself, Harbin turned and walked away, then turned around and started yelling again.

III.

Child Abuse Services Team Interview

A week after the handshake incident, Vinnie was interviewed by Child Abuse Services Team (CAST) interviewer Adrianna Ball. During the interview, Vinnie said Harbin shook his hand and tried to "pull me in" but pulled him "[n]ot that far." Vinnie was asked if Harbin pulled him five or six feet. Without answering the question, Vinnie said he had heard that Harbin was hit by a car and was mentally disabled. This exchange occurred:

"Q . . . So, he shook your hand here, and he pulled you over to here.

"A [(Vinnie)] Uh-huh.

"Q About—this is six feet.

"A Un-huh.

"Q And then did he do anything else?

"A No."

Vinnie said that Harbin pulled him “[n]ot quite to his place.” Vinnie might have been nine feet from Harbin’s door when Harbin released his hand. Ball asked Vinnie: “What do you think he was trying to do? Why was he trying to pull you towards his house?” Vinnie answered, “I don’t know.”

IV.

Harbin’s Evidence

Harbin testified at both the jury trial and the bench trial. He was born in 1963. When he was 17 years old, he was struck by a car as he was walking his bicycle across a street. He was in a coma for three or four months and hospitalized for four or five months. He sustained damage to the left and right frontal lobes of his brain, a fractured brain stem, a broken right foot, and a fractured rib. After the accident, he had to “learn how to walk, talk, eat, everything in a normal way again all over again from the start from scratch.” He has had “negative experience[s]” with nearly everyone with whom he had contact after the accident.

Harbin testified that when he moved into the Anaheim apartment complex in 2009, he wanted to make friends, so he introduced himself and tried to shake hands with everyone he encountered. He tried to be friendly to people even though they were not friendly to him. He would lie on the grass to get sun because the pool area was surrounded by a wall that prevented sun from getting in. He denied fondling himself while lying on the grass. He denied making inappropriate comments to children or sticking his hands down his boxer shorts while standing in the doorway of his apartment. On one occasion, he did stand in the doorway while wearing only skimpy underwear.

Harbin’s mother testified that, before the accident, Harbin was friendly, helpful, and kind, worked hard, was always in a good mood, and was not sexually promiscuous. After the accident, he was semicomatose for a year. He had trouble walking and talking clearly and lost a lot of weight. He became lonely and depressed and “was like a child again.”

Dr. Robert Sbordone, a clinical psychologist/neuropsychologist, evaluated Harbin in 1983 and reevaluated him in June 2012. Dr. Sbordone testified a scan showed that Harbin had an abnormal brain and that he had suffered a severe brain injury including a contusion on his frontal lobe. As a consequence, Harbin experiences rapid mood swings, becomes angry over inconsequential issues, and is unable to regulate emotions and behavior. Harbin exhibits poor judgment and inappropriate social behavior without regard for the feelings of others. Dr. Sbordone recounted that Harbin masturbated during an interview in 1983 yet did not express any sexual desire for him. Dr. Sbordone described this incident as an example of Harbin's inability to control his impulses.

Dr. Kenneth Nudleman, a neurologist, examined Harbin and reviewed his medical records. Dr. Nudleman testified the MRI's of Harbin's brain taken in 2012 showed it had shrunk significantly relative to his age. The shrinkage (atrophy) would be consistent with someone who was 80 years old or could be the result of trauma. Because the brain had shrunk, Dr. Nudleman would expect to see behavior changes, but he ruled out dementia. Harbin had frontal lobe damage and his brain showed scarring that likely was the result of the head trauma he suffered when he was struck by the car. Harbin's brain also displayed signs of "sheering"—microscopic tearing, bleeding, or scraping caused by impact to the brain.

V.

Prior Offenses

On several occasions in the spring of 1987, Harbin touched the breasts, vagina, and buttocks of his seven-year-old neighbor, F., usually over her clothing. He once exposed his erect penis to F. in her bathroom. Harbin also molested F.'s 11-year-old sister. He would molest the girls when their parents were out of the room and "would jump and sit normal" when the parents returned.

In June 1987, Harbin went to a local swimming hole and approached 12-year-old F.M., who was fishing. Harbin asked F.M. to go swimming naked with him and “to touch him.” F.M. declined. Harbin took off all of his clothing and, naked, got into the swimming hole. Harbin swam toward F.M. and appeared to be touching himself. Harbin reached toward F.M.’s groin area. F.M. jumped back and left.

In July 1987, five-year-old Julia was riding her bicycle with her sister but was left behind in an alleyway. Harbin asked Julia to walk over to him. He asked her why she was crying. When she told him, he reached under her clothing and fondled her vaginal area. He asked her if she felt better. Julia said “yes” because she thought that would make him stop and she would be able to get away. Harbin told Julia not to tell anybody what had happened.

In 1988, Harbin was convicted of one count of committing a lewd or lascivious act on a child in violation of Penal Code section 288, subdivision (a).

In 1992, Harbin approached his four-year-old neighbor, Martha, who was wearing a bathing suit. He asked Martha her name. According to Harbin, Martha pulled up the sides of her bathing suit so that the crotch of the bathing suit was inside of her vagina, exposing its sides. Harbin testified he said to Martha, “you don’t want to do that” and used his fingers to fix the bathing suit. Harbin testified that he pleaded guilty to misdemeanor child annoyance based on this incident.

In May 1996, Harbin approached 14-year-old R. and asked to see her belly button because, he said, he “likes to see children’s belly buttons.” Harbin pulled a belt loop on the front of R.’s pants and looked toward her belly button. R. told Harbin to “get away from me.” He let go of the belt loop and R. walked away. Later, Harbin approached R. again and offered to show her some record albums in his apartment. She declined. In December 1996, Harbin was convicted of one count of indecent exposure and one count of annoying or molesting a child.

PROCEDURAL HISTORY

An information charged Harbin with four counts, as follows: count 1—assault with the intent to commit a sexual offense (Pen. Code, §§ 220, subd. (a), 288, subd. (a)); count 2—attempt to commit a lewd act upon a child under 14 (*id.*, §§ 288, subd. (a), 664, subd. (a)); count 3—attempted kidnapping to commit a sex offense (*id.*, §§ 209, subd. (b)(1), 664, subd. (a)); and count 4—child annoyance with a prior sex conviction (*id.*, § 647.6, subds. (a)(1), (c)(2)). The information alleged Harbin had one prior strike conviction (*id.*, §§ 667, subds. (d), (e)(1), 1170.12, subds. (b) & (c)(1)), one prior serious felony conviction (*id.*, §§ 667, subd. (a)(1), 1192.7), and three prior prison term convictions (*id.*, § 667.5, subd. (b)).

A jury trial was conducted in September 2012. On October 1, the jury announced it was unable to reach a verdict. The jury had deadlocked nine to three in favor of acquitting Harbin on all counts. The court declared a mistrial.

In May 2013, Harbin waived his right to a jury trial. During the bench trial which followed, the court admitted into evidence and relied on the transcripts of witness testimony from the jury trial. Harbin was the only witness who testified in person at the bench trial.

During Harbin's testimony, the prosecutor moved to dismiss counts 1, 2, and 3 "in the interest of justice primarily based on the prior jury results which resulted in a mistrial." The court asked the prosecutor, "you're making a comment on [the jury's] determination and your determination of the sufficiency of the evidence to support those counts; am I correct?" The prosecutor responded, "[y]es." The court granted the motion and dismissed counts 1, 2, and 3. The prosecutor also moved to dismiss the allegations of the three prior prison term convictions (Pen. Code, § 667.5, subd. (b)) and the one prior serious felony conviction (*id.*, § 667, subd. (a)(1)). The court granted the motion and ordered those priors dismissed.

The court found Harbin guilty of child annoyance with a prior sex conviction as alleged in count 4 and found true the prior strike conviction allegation. The court sentenced him to the upper term of six years on count 4, doubled by the prior strike, for a total term of 12 years in prison.

DISCUSSION

I.

Substantial Evidence Supported the Conviction for Child Annoyance with a Prior Sex Conviction.

A. Standard of Review

“To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) We do not resolve credibility issues or evidentiary conflicts because determination of witness credibility and the truth or falsity of facts is the exclusive province of the trier of fact. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.” (*Ibid.*)

B. Substantial Evidence Supported Both Requirements of Child Annoyance.

The trial court found Harbin guilty of one count of child annoyance with a prior sex conviction. Penal Code section 647.6, subdivision (a)(1) states a misdemeanor offense for “[e]very person who annoys or molests any child under 18 years of age.” The offense becomes a felony under section 647.6, subdivision (c), if the defendant has a prior conviction under Penal Code section 288. A conviction under section 647.6, subdivision (a) requires: (1) “*an act objectively and unhesitatingly viewed as irritating or disturbing,*” which is (2) “prompted by an abnormal sexual interest in children.”

(*People v. Lopez* (1998) 19 Cal.4th 282, 290.) Harbin contends substantial evidence does not support a finding on either requirement.

1. *An Act Objectively and Unhesitatingly Viewed as Irritating or Disturbing*

“[T]he words ‘annoy’ and ‘molest’ . . . are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person. [Citations.] . . . [¶] ‘Annoy’ and ‘molest’ ordinarily relate to offenses against children, with a connotation of abnormal sexual motivation. The forbidden annoyance or molestation is not concerned with the child’s state of mind, but rather refers to the defendant’s objectionable acts that constitute the offense. [Citation.] [¶] Accordingly, to determine whether the defendant’s conduct would unhesitatingly irritate or disturb a normal person, we employ an *objective* test not dependent on whether the child was in fact irritated or disturbed.” (*People v. Lopez, supra*, 19 Cal.4th at pp. 289-290.) The actor’s intent also is not considered: an outwardly innocent act accompanied by a secret sexual motivation does not satisfy the statutory requirement. (*Id.* at p. 291.)

Harbin and the Attorney General disagree over proper characterization of the evidence. Harbin contends the evidence does not support a finding that he committed an act objectively and unhesitatingly viewed as irritating or disturbing because he only “briefly squeezed Vinnie’s hand and pulled on his arm, causing the boy’s upper body to shift forward.” The Attorney General contends Harbin “squeezed Vinnie’s hand and pulled Vinnie toward him and his open apartment door, scaring Vinnie.” We need not decide which characterization is more accurate. The substantial evidence standard of review requires us only to determine whether there was sufficient evidence to support a finding that Harbin committed an act objectively and unhesitatingly viewed as irritating or disturbing. The evidence supported such a finding.

Harbin was a stranger. He had just moved into the apartment complex a few days before the handshake incident. To a child, being approached and touched, even

in a seemingly innocent way, by an adult stranger, can be a disturbing experience. And Harbin was taller, bigger, and much older than Vinnie: Harbin was six feet tall, weighed 170 to 180 pounds, and was 46 years old.

Harbin squeezed Vinnie's hand very tightly. A firm or tight handshake, even between adults, can be an annoying or painful experience. Vinnie testified Harbin pulled him toward Harbin's open apartment door. Vinnie testified he took a step forward. M.S. also testified that Harbin squeezed Vinnie's hand and pulled Vinnie toward Harbin's open apartment door. In the CAST interview, Vinnie said that Harbin pulled him not quite to Harbin's apartment and that Vinnie might have been nine feet from the apartment door when Harbin let go. Vinnie yelled at Harbin to let go or stop. Vinnie yelled for his mother. Each time Vinnie yelled "mom," Harbin loosened his grip.

Harbin contends he did nothing more than give Vinnie a firm or hard handshake. But "the annoying or molesting act need not, in and of itself, be lewd." (*People v. Thompson* (1988) 206 Cal.App.3d 459, 466.) The evidence, viewed in the light most favorable to the judgment, supported a finding that Harbin's conduct, though not overtly lewd, would unhesitatingly irritate or disturb a normal person.

2. *Prompted by an Abnormal Sexual Interest in Children*

Harbin's prior acts of sexual misconduct, and Harbin's behavior while living at the apartment complex, supported a finding that Harbin was prompted by an abnormal sexual interest in children.

The handshake incident itself is evidence of improper motivation. A handshake is an act of physical touching, and Harbin shook Vinnie's hand not once, but twice in succession. The second handshake was quite firm, and Harbin used the firm grip to pull Vinnie toward the open apartment door to Harbin's apartment.

Although there is a dispute about how far Harbin pulled Vinnie, the evidence must be viewed in light of the evidence of Harbin's extensive history of sexual

misconduct toward children. In 1987, Harbin committed sexual offenses against F. and her sister, F.M., and Julia. He molested F., her sister, and Julia, asked F.M. to touch him, and, while naked, reached toward F.M.'s groin. In 1994, Harbin pleaded guilty to misdemeanor child annoyance for the incident with Martha. In 1996, Harbin approached 14-year-old R., asked to see her belly button, then pulled a belt loop on the front of R.'s pants and looked toward her belly button.

While Harbin was living in the apartment complex, he engaged in behavior that graciously could be described as creepy or bizarre. He sunbathed in the grassy common area and offered to shake hands with children and teenagers walking by. He was once seen fondling his genitals while sunbathing. At least once, he was seen wearing only skimpy underwear while standing in the open doorway of his apartment. An apartment resident, Anderson, saw Harbin, who was wearing only loose boxer shorts, standing in the open doorway of his apartment with both of his hands tucked inside the waistband of his boxer shorts. Harbin was looking at Anderson's two boys.

Harbin argues his accident when he was 17 years old led to a loss of brain tissue, which impaired his ability to process or understand his own actions or his environment. The accident, and the injuries suffered by Harbin as a result, were indeed tragic. But Harbin was deemed competent to stand trial² and did not assert insanity as a defense. (See Pen. Code, § 25, subd. (b).)

Harbin argues: "Even if it was reasonable to infer that his priors and behavior in the instant case showed that he was motivated to shake hands by a sexual interest in children (or Vinnie himself), the opposite conclusion is just as reasonable: he just wanted to introduce himself to Vinnie . . . and could not read the social cues to do so in a manner that did not frighten an 11 year-old." Harbin argues that, because two reasonable inferences could be drawn from the circumstantial evidence, the trier of fact

² In June 2010, the trial court found Harbin was not competent to stand trial. In April 2011, the court found Harbin's competency had been restored.

had to accept the inference supporting innocence. (See CALCRIM No. 224.) On appeal, however, we accept whichever inference was drawn by the trier of fact, so long as the inference is reasonable: ““Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.]” [Citation.] Where the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal. [Citation.]” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) From the circumstantial evidence in this case, a reasonable inference could be drawn that Harbin’s conduct in shaking hands with Vinnie was prompted by an abnormal sexual interest in children.

II.

The Trial Court Had No Sua Sponte Duty to Instruct on or Consider Battery Because It Is Not a Lesser Included Offense of Child Annoyance.

Harbin contends the trial court erred by not instructing the jury in the first trial on battery as a lesser included offense of child annoyance. A lesser offense is necessarily included in the charged offense if either the “elements” test or the “accusatory pleading” test is met. (*People v. Lopez, supra*, 19 Cal.4th at p. 288.) The elements test is satisfied if all of the elements of the lesser offense are included in the elements of the greater offense. (*Ibid.*) “Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.” (*Ibid.*) Under the accusatory pleading test, a lesser offense is necessarily included in the greater offense if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

When the accusatory pleading describes the charged offense in the statutory manner, only the elements test is relevant to determine any lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1533.) That is the situation here: The information charged Harbin with all four counts in statutory terms only. Battery is not a lesser included offense of child annoyance under the elements test because Penal Code section 647.6, subdivision (a)(1) does not require a touching (*People v. Lopez, supra*, 19 Cal.4th at p. 288), while battery cannot be accomplished without a touching (*People v. Marshall* (1997) 15 Cal.4th 1, 38).

Harbin argues that, notwithstanding the elements test, the trial court had an obligation to instruct on battery because the evidence at trial supported a battery instruction. A trial court has no sua sponte duty to instruct on an uncharged lesser offense that is supported by the evidence but which is not necessarily included in the charged offense. (*People v. Birks, supra*, 19 Cal.4th at pp. 112, 119, 136-137; see *People v. Kraft* (2000) 23 Cal.4th 978, 1064.) The trial court cannot instruct the jury on such a lesser related offense without the prosecutor's consent. (*People v. Birks, supra*, at p. 136.) The trial court in this case therefore was not permitted to instruct on (or consider) battery because it was not charged in the information and it was not a lesser included offense.

III.

There Was No Ineffective Assistance of Counsel.

Harbin contends his counsel was ineffective for not requesting a battery instruction at the jury trial or arguing battery at the bench trial. To prevail on a claim of ineffective assistance of counsel, a defendant must prove both (1) his or her attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) his or her attorney's deficient representation subjected him to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.) Prejudice means a "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, at p. 694.) A reasonable probability means a "probability sufficient to undermine confidence in the outcome." (*Ibid.*)

"Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) We reverse on direct appeal for ineffective assistance of counsel only when "the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442.)

There was a rational tactical purpose for not requesting a battery instruction in the first trial and not arguing battery in the second trial. Requesting an instruction on battery would have given the jury the option of convicting Harbin on that offense instead of acquitting him of all charges. In both trials, Harbin's counsel could rationally believe the jury or the court would acquit Harbin. This was especially true in the second trial because it was known the jury in the first trial had split nine to three in favor of acquittal on all counts. Harbin suggests his trial counsel had no rational tactical purpose for not requesting a battery instruction in light of the fact his counsel did not object to an instruction on simple assault as a lesser included offense to two of the other counts (dismissed during the bench trial). The court instructed on simple assault and had a sua sponte duty to do so because simple assault was a lesser included offense of the charged offenses. (*People v. Licas, supra*, 41 Cal.4th at p. 366.) Any objection by counsel to giving a simple assault instruction would have been futile.

Moreover, Harbin has not shown that the prosecution would have agreed to a battery instruction in the first trial or to allow the court in the second trial to consider battery as a charged offense. Harbin therefore has not shown prejudice from any ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.