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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR ARCINIEGA,

Defendant and Appellant.

H036215

(San Benito County

Super. Ct. No. CR0800793)

Defendant Salvador Arciniega appeals a judgment entered following a guilty verdict at trial. On appeal, defendant asserts the trial court erred in imposing a consecutive term and in requiring him to undergo AIDS testing.

STATEMENT OF THE FACTS AND CASE

K. is defendant's grand-niece. On July 1, 2007, when K. was seven years old, she went to defendant's apartment complex where he lived with his wife. K.'s cousins were swimming in the apartment pool, and K. was going to join them. K. did not have a bathing suit, so she went with defendant to his apartment to borrow a pair of shorts from her aunt. Defendant and K. rode alone in an elevator to defendant's apartment. While in the elevator, defendant put his hands inside K.'s shorts, touching her vaginal area and her buttocks. Defendant then knelt down, lifted K.'s shirt and sucked on K.'s nipple on her breast.

On January 26, 2008, K. and her brother were at their great-grandmother's house and defendant was there as well. K. and her brother went for a ride with defendant in his car. Defendant let K.'s brother out of the car, and drove K. alone for a short distance. Defendant stopped the car, and lay on top of K. While he was lying on top of her, defendant sucked her nipple on her breast. K. was leaning on the car door at the time, and fell out of the car.

Defendant was charged with two counts of lewd and lascivious acts with a child (Pen. Code, § 288, subd. (a)¹; counts 1 and 2), and one count of cruelty to a child (§ 237a, subd. (a); count three). The prosecution dismissed count 3 at the beginning of trial. Defendant was convicted by a jury of both counts. Defendant was sentenced to the mid-term of six years on count 1, and a consecutive term of two years on count 2, for a total term of eight years in state prison.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant asserts the trial court abused its discretion in imposing the consecutive term of two years on count two, and that he was denied effective assistance of counsel, because his attorney failed to object at the sentencing hearing. In addition, defendant argues the court erred in ordering him to submit to AIDS testing, because there is not substantial evidence to support the need for testing.

Sentencing

Under California sentencing law, trial courts generally have discretion to impose consecutive or concurrent sentences on multiple felony convictions. (§ 669; see *People v. Scott* (1994) 9 Cal.4th 331, 349.) Section 669 provides in pertinent part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or

¹ All further statutory references are to the Penal Code.

by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively.”

Here, the trial court exercised its discretion and sentenced defendant to one-third the midterm for count 2, to be served consecutive to the sentence imposed in count 1. Defendant’s counsel did not object the court’s imposition of the consecutive sentence. On appeal, defendant concedes the issue is waived. (*People v. Scott, supra*, 9 Cal.4th at p. 356 [“[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.”].) However, defendant asserts the failure to object at sentencing denied him effective assistance of counsel.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) That right “entitles the defendant not to some bare assistance but rather to *effective* assistance.” (*Ibid.*) “To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) ‘When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of representation provided by counsel. ‘If the record sheds no light on why counsel acted or failed to act in the manner challenged, ‘unless counsel was asked for an explanation and failed to provide one, or

unless there simply could be no satisfactory explanation,' [citation], the contention must be rejected." ' ' ' (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.)

An appellate 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. . . , that course should be followed." (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

Here, defendant's counsel's failure to object to the court's discretionary consecutive sentence was not prejudicial to defendant, because there is no reasonable probability that, had counsel objected, the trial court would have imposed a concurrent sentence on count 2.

In ordering the consecutive term on count two, the court stated: "I'm going to impose, for count 2, one-third the midterm, consecutively imposed. That would be two additional years. And it is based upon the facts of the crime involving great violence, great bodily harm, or the threat of that, and it disclosed a high degree of viciousness and callousness. That's not merely checking on an injury but in fact fondling her breasts, kissing her nipples, not once but twice, pulling down her pants and touching her vaginal area, and that's what the jury found to be true, and that's the basis for the sentence."

California Rules of Court rule 4.425 sets for the criteria affecting consecutive sentences. Included in these criteria is the fact that "(3) [t]he crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(3).) The trial court needs only one reason to impose consecutive sentences. (*People v. Bishop* (1984) 158 Cal.App.3d 373, 382-383.)

Here, the underlying offenses arose from two separate incidents, one occurring on July 1, 2007, and the other on January 26, 2008. In addition, the crimes were committed

in different locations, one in the elevator at defendant's apartment complex, and the other in defendant's car. Moreover, the court noted in its statement at sentencing that defendant "fondl[ed] her breasts, kissing her nipples, not once but twice," referencing the two charged crimes in this case. (RT 2768) The separation of these crimes is sufficient to support the imposition of a consecutive sentence under California Rules of Court, rule 4.425(a)(3).

In short, because there is sufficient evidence to support the court's choice to impose a consecutive sentence in this case, there is no basis from which to conclude that an objection by counsel would have resulted in an outcome more favorable to defendant. His claim of ineffective assistance necessarily fails.

AIDS Testing

Section 1202.1, subdivision (a), requires a court to order an individual adjudged to be a person described by section 602 on the ground that the individual had committed any of the specified sexual offenses to submit to an AIDS test. The list of specified offenses includes lewd or lascivious conduct with a child in violation of section 288 if "the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (Pen. Code, § 1202.1, subd. (e)(6)(A)(iii), italics added.) "Probable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim. [Citations.]" (*People v. Butler* (2003) 31 Cal.4th 1119, 1127.) The court is statutorily required to "note its [probable cause] finding on the court docket and minute order if one is prepared." (Pen. Code, § 1202.1, subd. (e)(6)(B).)

An order compelling an AIDS test pursuant to section 1202.1 may be challenged on appeal for insufficiency of the evidence even absent an objection, because involuntary

testing is “strictly limited by statute” and conditioned “upon a finding of probable cause” and “[w]ithout evidentiary support the order is invalid.” (*People v. Butler, supra*, 31 Cal.4th at p. 1123.) “Under the substantial evidence rule, a reviewing court will defer to a trial court’s factual findings to the extent they are supported in the record, but must exercise its independent judgment in applying the particular legal standard to the facts as found. [Citations.]” (*Id.* at p. 1127.) “[I]f the trial court orders testing without articulating its reasons on the record, the appellate court will presume an implied finding of probable cause. [Citation.]” (*Ibid.*) “[T]he appellate court can sustain the order only if it finds evidentiary support, which it can do simply from examining the record. Moreover, even if the prosecution *could have* established probable cause, in the absence of sufficient evidence *in the record*, the order is fatally compromised. [Citation.]” (*Ibid.*)

Defendant contends that there is insufficient evidence to support the probable cause finding required by section 1202.1, and the People concede the point. The record at trial shows defendant touched the victim’s vaginal area, but it does not show that there was any vaginal penetration, or that there was any bodily fluid present in that interaction. The evidence that defendant sucked the victim’s breast might include defendant’s saliva on the victim’s skin, but that is not clear from the record. Absent additional facts, there is not sufficient evidence to support a finding of probable cause that a “bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim” as required by the statute. (§ 1202.1, subd. (e)(6)(A)).

The parties agree that the order for AIDS testing must be stricken, and that the appropriate remedy is to remand the matter to the trial court for further proceedings to “determine whether the prosecution has additional evidence that may establish the requisite probable cause.” (*People v. Butler, supra*, 31 Cal.4th at p. 1129.)

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court with directions to permit the prosecution the opportunity to offer evidence to support an AIDS testing order.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

WALSH, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.