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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO MORALES,

Defendant and Appellant.

2d Crim. No. B270228  
(Super. Ct. No. BA431658)  
(Los Angeles County)

Ricardo Morales appeals a judgment following conviction of three counts of child molestation and one count of attempted child molestation, with a finding that he committed the criminal offenses upon more than one child. (Pen. Code, §§ 288, subd. (a), 664, 1203.066, subd. (a)(7), 667.61, subd. (c).)<sup>1</sup> We order correction of the abstract of judgment to conform to the oral pronouncement of judgment, but otherwise affirm.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

### *FACTUAL AND PROCEDURAL HISTORY*

This appeal concerns lewd acts and attempted lewd acts on four children committed by Morales, a maintenance employee at two Los Angeles apartment buildings--the West 54th Street building and the 41st Street building. Morales encountered the children in the apartment buildings and touched their genitals over their clothing. He sometimes gave them money following the molestations.

#### *Count 1 - R.C.*

When R.C. was six years old, she visited her father and grandmother in the 41st Street apartment building. On one occasion, Morales touched R.C.'s vagina over her clothing. In a second incident, he rubbed her vagina, causing her to bleed. On yet another occasion, Morales pushed R.C. and S.H. onto a sofa and touched their buttocks. Morales stopped when S.H. stated that she would call the police. R.C.'s brother saw the sofa incident and later informed a police officer.

R.C. also testified that her grandmother's boyfriend touched her vagina over her clothing. R.C. complained to her mother and grandmother regarding grandmother's boyfriend.

R.C.'s mother examined R.C.'s vagina and concluded that the area appeared unusual. R.C.'s mother reported the incidents to law enforcement. On September 17, 2014, Los Angeles Police Detective Ryan Lee interviewed R.C. R.C. reported that Morales and also her grandmother's boyfriend had molested her. She stated that Morales touched her over as well as under her clothing.

#### *Count 2 - S.H.*

S.H. and her five sisters lived with their mother in the 41st Street apartment building. When she was seven or eight

years old, Morales “rubbed” her vagina over her clothing. Afterwards, he gave her one dollar and told her not to tell anyone. S.H. complained to her mother that Morales had touched her vagina.

S.H. also testified that she saw Morales molest her sister, M.H., when M.H. was six years old. At the time, M.H. was watching Morales repair a bathtub. S.H. informed her mother of the incident.

*Count 3 - M.H.*

M.H. testified that Morales touched her vagina over her clothing more than once. On one occasion, when he performed repairs in her apartment bathroom, he touched her vagina. She “pushed” his hands away and ordered him to stop. M.H. informed her sister and her mother of the molestations.

M.H. also testified that Morales touched her again the following day. She informed her mother who then spoke with Morales.

*Count 4 - C.J.*

C.J. lived with her family in the West 54th Street apartment building. She knew Morales as “the Spanish guy” who performed repairs in the building.

When C.J. was nine years old, Morales kissed her on the neck as he was repairing a window in her apartment. On other occasions, C.J. informed her mother that Morales gave her dollar bills. C.J.’s mother then spoke with Morales and asked that he not give her daughter money. She also instructed C.J. not to accept money from Morales.

On February 16, 2013, Morales saw C.J. in the communal kitchen of the apartment building. C.J. testified that Morales touched her genitals over her clothing, kissed her, and

gave her money: “He saw me and he grabbed me . . . and he just started touching me. . . . [m]y boobies, my toochies [vagina], and my butt.” Afterwards, Morales gave C.J. five dollars.

C.J. returned to her apartment and informed her mother and older sister that Morales gave her money because “[h]e touches [her].” C.J.’s mother and sister became angry and confronted Morales. He denied touching C.J. and became “defensive.” When C.J.’s mother threatened to harm him, Morales ran toward the back of the apartment building. C.J.’s mother and sister pursued and caught Morales; C.J.’s mother “wrestl[ed]” with him until police officers arrived and separated them. C.J. pointed to Morales and stated: “I don’t want that man to touch me anymore.”

#### *Defense Evidence*

Josue Marroquin testified that he was Morales’s assistant and that the two men worked together at the apartment buildings. Marroquin stated that he and Morales were “always together . . . watching out for each other.” Marroquin stated that children were not present when they performed repairs inside the apartments.

#### *Conviction, Sentencing, and Appeal*

The jury convicted Morales of three counts of child molestation and one count of attempted child molestation (count 3 - M.H.). (§§ 288, subd. (a), 664.) The jury also found that Morales committed the criminal offenses upon more than one child. (§§ 1203.066, subd. (a)(7), 667.61, subd. (c).) The trial court sentenced Morales to a prison term of 45 years to life, consisting of three consecutive sentences of 15 years to life and a concurrent three-year term. The court also imposed a \$300 restitution fine, a \$300 parole revocation restitution fine

(suspended), a \$160 court operations assessment, and a \$120 criminal conviction assessment, and awarded Morales 437 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Morales appeals and contends that: 1) the trial court erred by not instructing sua sponte regarding the lesser included offense of attempted child molestation regarding counts 1 and 2, and simple assault regarding count 1; and 2) his counsel was ineffective for not requesting the lesser included offense instructions.

## *DISCUSSION*

### *I.*

Morales argues that the trial court erred by not instructing sua sponte regarding the lesser included offenses of attempted child molestation regarding R.C. and S.H. (counts 1 and 2), and simple assault regarding R.C. (count 1). Morales asserts that R.C.'s description of the molestations was vague and points out that her grandmother's boyfriend also molested her. Morales suggests that no touching occurred with S.H. because he reportedly "made no noises and said nothing" when he touched her. He points out that he was convicted of only attempted commission of a lewd act with M.H. (count 3). Morales contends that he would have obtained a more favorable outcome had the jury received lesser included offense instructions. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Whether the trial court should have instructed with a particular instruction involves resolution of a mixed question of law and fact that is predominantly a legal question. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Johnson* (2016) 6 Cal.App.5th 505, 509-510.) Thus, Morales's claim of instructional

error is subject to our independent review. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218 [“We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense”].)

The trial court has a sua sponte duty to instruct regarding lesser included offenses when the evidence raises a question whether every element of the charged offense is present, but not when there is no evidence that the offense is less than that charged. (*People v. Breverman, supra*, 19 Cal.4th 142, 154.) Thus, the court must instruct sua sponte regarding a lesser included offense if there is substantial evidence the defendant is guilty *only* of the lesser offense. (*People v. Shockley* (2013) 58 Cal.4th 400, 403.) “On the other hand, if there is no proof, *other than an unexplainable rejection of the prosecution’s evidence*, that the offense was less than that charged, such instructions shall not be given.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1063, italics added.)

To establish an attempted violation of section 288, subdivision (a), the prosecution must prove that “(1) the defendant intended to commit a lewd and lascivious act with a child under 14 years of age, and (2) the defendant took a direct but ineffectual step toward committing a lewd and lascivious act with a child under 14 years of age.” (*People v. Singh* (2011) 198 Cal.App.4th 364, 368.) It is relatively uncommon that a defendant is convicted of attempting to commit a lewd or lascivious act with a child. (*People v. Memro* (1985) 38 Cal.3d 658, 697, fn. 48 [“There are very few appellate decisions involving attempted section 288 violations”], overruled on other grounds by *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) Factual circumstances supporting the charge of attempted commission of

a lewd or lascivious act likely involve intervening events precluding the accused from making physical contact with his intended victim. (E.g., *Singh*, at pp. 367-368 [defendant arrested in Internet sting in which adult decoy pretended to be a 12-year-old child].)

The trial court did not err by not instructing sua sponte regarding attempt because there was no evidence that Morales took only a direct but ineffectual step toward committing a lewd or lascivious act. (*People v. Singh*, *supra*, 198 Cal.App.4th 364, 368 [elements of attempted lewd or lascivious act].) R.C. and S.H. described acts of physical contact by Morales. R.C. testified that Morales touched her vagina, causing it to bleed, and he tossed her and S.H. on the sofa, touching their buttocks. S.H. testified that Morales touched her vagina on several occasions. He also gave her money following one touching. As between an attempted violation or an actual violation of section 288, subdivision (a), no reasonable juror who believed any portion of the girls' testimonies would have concluded that Morales was guilty only of the lesser crime of attempt.

This also holds true with the lesser included offense of simple assault on R.C. The evidence at trial established each element of section 288, subdivision (a). There is no substantial evidence that Morales is guilty only of simple assault on R.C. and not the commission of lewd and lascivious acts. (*People v. Shockley*, *supra*, 58 Cal.4th 400, 403 [statement of general rule].)

## II.

Morales argues that his counsel was ineffective for not requesting the lesser included offense instructions regarding counts 1 and 2, discussed *ante*.

To establish a claim for ineffective assistance of counsel, defendant must establish that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692; *People v. Mickel* (2016) 2 Cal.5th 181, 198.) In demonstrating deficient performance, defendant bears the burden of showing that counsel's performance fell below an objective standard of reasonableness. (*Mickel*, at p. 198; *People v. Orloff* (2016) 2 Cal.App.5th 947, 955.) In demonstrating prejudice, defendant bears the burden of establishing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Mickel*, at p. 198.)

We presume that counsel's actions fall within the broad range of reasonableness, and afford great deference to counsel's tactical decisions. (*People v. Mickel*, *supra*, 2 Cal.5th 181, 198.) For this reason, a reviewing court will reverse a conviction based upon the ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had no rational tactical purpose for an action or omissions. (*Ibid.*; *People v. Orloff*, *supra*, 2 Cal.App.5th 947, 955.) Moreover, counsel's failure to make an unmeritorious motion or request for instruction does not constitute ineffective assistance of counsel. (*People v. Jennings* (2010) 50 Cal.4th 616, 667, fn. 19; *People v. Szadzewicz* (2008) 161 Cal.App.4th 823, 836.)

Here counsel's alleged failure to request unsupported jury instructions does not amount to the ineffective assistance of counsel. (*People v. Szadzewicz*, *supra*, 161 Cal.App.4th 823, 836.) Moreover, counsel may have chosen to argue that the children fabricated the allegations or were unduly influenced by their friends or family to complain. We defer to counsel's tactical



decisions and presume that his actions fall within the broad range of reasonableness. (*People v. Mickel, supra*, 2 Cal.5th 181, 198.)

### III.

The Attorney General points out that the abstract of judgment mistakenly indicates that Morales was sentenced to 15 years to life for count 3, instead of 15 years to life for count 4 (Box 6a). The abstract also does not indicate that sentencing was pursuant to the sentencing scheme of section 667.61 (Box 8).

The trial court's oral pronouncement of judgment governs any conflict with the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [abstract of judgment may not add to or modify the oral pronouncement of judgment]; *People v. Hartley* (2016) 248 Cal.App.4th 620, 637 [abstract of judgment cannot prevail over the court's oral pronouncement of judgment to the extent the two conflict].)

The trial court shall correct the abstract of judgment to reflect that Morales was sentenced to 15 years to life for count 4, and that he was sentenced pursuant to section 667.61. The court shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Craig J. Mitchell, Judge  
Superior Court County of Los Angeles

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