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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RUDY NICHOLAS MENDOZA, Defendant and Appellant.	B238536 (Los Angeles County Super. Ct. No. VA118246)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Rudy Nicholas Mendoza was convicted of two counts of oral copulation/sexual penetration of a child and two counts of lewd acts on a child. He contends on appeal that the trial court erred in failing to instruct the jury, sua sponte, on the lesser included offense of battery. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

By information dated March 28, 2011, appellant was charged with two counts of oral copulation/sexual penetration of a child under the age of 10 (Pen. Code, § 288.7, subd. (b)/§ 289, counts one and two)[1] and two counts of committing a lewd act upon a child (§ 288, subd, (a), counts three and four). The crimes allegedly occurred between April 5, 2007 and January 29, 2009. It was further alleged that pursuant to section 1170.12, subdivisions (a) through (d), section 667, subdivisions (b) through (i), section 667.5, subdivision (b), and section 667, subdivision (a)(1), appellant had suffered a prior conviction for burglary in January 2006.

B. *Evidence at Trial*

1. *Prosecution Evidence*

The alleged victim, S., who was 10 at the time of trial in 2011, testified that when she was six, she lived in a foster home with appellant's mother, Esperanza A. She had a room with a bunk bed, which she shared with appellant for a brief period near the end of 2007. "[E]very night" when they shared the bedroom, appellant moved her from the top bunk to the bottom bunk, took off her pants, and put his

[1] Undesignated statutory references are to the Penal Code.

finger in her "front [private] part." He put his mouth on the same area. He also placed her hand on his penis and moved it until "this gooey thing" came out. Appellant threatened to hit S. if she told anyone. She did not tell anyone for three years, when she told her mother with whom she had been reunited sometime earlier. On cross-examination, defense counsel asked whether appellant had just touched "the outside of where you go pee." S. repeated "he put his finger in me."

Two recordings were played to the jury. One was of a telephone call between appellant and S.'s mother, Diane, who attended the same church as appellant. It was set up by officers in an attempt to obtain an admission. Diane informed appellant of S.'s accusations that he had "touched her in [an] inappropriate way" and "made her touch [his] penis every night." Appellant denied knowing what she was referring to or that anything had happened with S. The other recording was of appellant's interview with officers immediately after his arrest, which occurred on the same day as the conversation with Diane. Appellant first denied everything. Eventually, he admitted touching S. He said that S. touched his penis, but denied that she manipulated it and indicated that her touching had occurred when she jumped on him during play. He denied putting his fingers inside her or ejaculating in front of her. He said he went into the bathroom to masturbate after getting aroused. He admitted the inappropriate touching incidents happened more than once during the two weeks he stayed with his mother. He stated he had been using alcohol and drugs and was "high" or "buzzing" when the incidents occurred.

2. *Defense Evidence*

Appellant testified on his own behalf. He admitted that he fondled S.'s genital area and put her hand on his penis. He denied putting anything inside her vagina or putting his mouth on her. He denied moving her from the top bunk to

the bottom bunk. He stated the inappropriate touching happened "a couple" of times. On cross-examination, appellant testified he did not remember the details of how the molestation began. He further testified that he was using methamphetamine and drinking at the time, which caused his mind to play tricks on him. However, he claimed he would have remembered if he had penetrated her with his fingers or touched her with his mouth, or if she had "ejaculat[ed]" him. He denied threatening S. He admitted having suffered a prior felony conviction for residential burglary.

The defense also called Louis Jacquez, who became acquainted with appellant when Jacquez participated in a Christian drug rehabilitation program where appellant was a director. Jacquez testified that appellant had been helpful to his rehabilitation and was a truthful person with a good reputation at their church.

Appellant's mother, Esperanza A., testified that S. had lived with her from April 2007 until February 2009. Appellant stayed in her home for only two or three weeks during that period. A social worker visited the girl weekly when she lived with Esperanza A. S. said nothing to the social worker or Esperanza A. about being molested by appellant. Esperanza A. continued to babysit for S. after the girl was returned to her family and both families attended the same church. When S. saw appellant, she referred to him as "Uncle Rudy" and often hugged him. She indicated curiosity about appellant's potential relationship with her mother and said if they married, Esperanza A. could become her grandmother.

C. *Pertinent Instructions and Argument*

Concerning counts one and two, the court instructed the jury: "Any person 18 years of age or older who engages in oral copulation or sexual penetration with a child who was ten years of age or younger, is guilty of violation of Penal Code section 288.7." With respect to counts three and four, the jury was instructed:

"Every person who willfully commits any lewd or lascivious act upon, or with the body, or any part or member thereof, of a child under the age of 14 years, with the specific intent of arousing, appealing to, or gratifying the lusts or the passions, or the sexual desires of that person or of the child, is guilty of the crime of committing a lewd or lascivious act upon the body of a child, in violation of Penal Code section 288(a)."

After the close of evidence and prior to reading the instructions, the court asked counsel if there were any lesser included offenses on which to instruct the jury. Both the defense attorney and the prosecutor said there were none.

During final argument, the prosecutor urged the jury to convict appellant of counts one and two based on the evidence of penetration and oral copulation. The defense attorney conceded that appellant had committed the section 288, subdivision (a), violations alleged in counts three and four, but contended there was insufficient evidence to support counts one and two.

D. *Verdict and Sentencing*

The jury found appellant guilty of all four counts. Appellant admitted the truth of the prior conviction allegation.

The court sentenced appellant to state prison for a total of 81 years to life, consisting of: for count one, the upper term of 15 years, doubled; for count two, the upper term of 15 years, doubled; for count three, the midterm of six years, doubled; and for count four, one-third the midterm of two years, doubled, plus an additional five years due to the prior serious felony allegation.

DISCUSSION

The parties do not dispute that a trial court has a duty to instruct the jury on the general principles of law necessary to properly determine the material issues in

the case, including instructions on any lesser included offenses supported by the evidence. (See, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 154 [“‘“It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citation.]’”]; *People v. Reeves* (2001) 91 Cal.App.4th 14, 51.) Instructions on lesser included offenses are required “whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.] ‘Substantial evidence’ in this context is ‘“evidence from which a jury composed of reasonable [persons] could . . . conclude[]”’ that the lesser offense, but not the greater, was committed. [Citations.]” (*People v. Breverman*, *supra*, at p. 162.)

The definition of battery includes an “unlawful touching of the victim.” (*People v. Rundle* (2008) 43 Cal.4th 76, 144, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.) Courts have held that battery is a lesser included offense of certain sexual crimes, including forcible sodomy and rape. (*People v. Hughes* (2002) 27 Cal.4th 287, 366; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636, fn. 2, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) Appellant contends the evidence -- particularly, his testimony that he fondled S. and placed her hand on his penis, but did not penetrate her or orally copulate her as charged in counts one and two -- was sufficiently substantial to allow the jury to reasonably conclude that the lesser offense of battery, but not the greater of oral copulation/sexual penetration, was

committed. Accordingly, he contends that the court erred in failing to instruct on battery as a lesser included offense of counts one and two.[2]

The failure to instruct on a lesser included offense is judged under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. Under that standard, we reverse only if an examination of the record establishes a reasonable probability that the error affected the outcome. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.) Appellant cites *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351-352 for the proposition that "[a]n error in failing to instruct on lesser included offenses requires reversal unless it can be determined that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." *Ramkeesoon* was effectively overruled by *Breverman*, in which the court explained that "the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility," and held that "such misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome." (19 Cal.4th at p. 165, citing Cal. Const., art. VI, § 13.)

Assuming the court should have instructed on the lesser included offense of battery, we conclude any error was harmless under the applicable standard. The jury had no reason to credit the testimony of appellant, a convicted felon, who was heard in recorded statements changing his story from complete innocence to an

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[2] Respondent does not contend that appellant invited the error. (See *People v. Valdez* (2004) 32 Cal.4th 73, 115 ["Invited error . . . will . . . be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction."]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127 ["For the doctrine of invited error to apply, it must be clear from the record that counsel had a deliberate tactical purpose in suggesting or acceding to an instruction, and did not act simply out of ignorance or mistake."].)

admission that he touched the girl's vagina for sexual gratification, but did nothing else. Both pre-trial statements were at odds with the version of events he related at trial, where he testified that he fondled the girl and deliberately put her hand on his penis. During his testimony, he admitted that he had lied in speaking with her mother and during the initial part of his interview with officers when he claimed innocence. He also testified that he was high when the encounters occurred and could not recall all of the details. In contrast, S.'s testimony that appellant penetrated her, put his mouth on her, and moved her hand on his penis until a substance fitting the description of ejaculate came out remained consistent. The defense conceded the victim's report of sexual abuse was true, and identified no conceivable motive on the child's part to exaggerate the extent of the misconduct and no alternative explanation for her knowledge of the sexual activities she described and the mechanics of male sexual climax. Defendant, on the other hand, had every reason to minimize his admitted misconduct in using the girl for his sexual gratification. On this record, we find no reasonable probability that if instructed on the elements of battery, the jury would have reached a different result.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.