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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. PAUL WILLIAM HACK, Defendant and Appellant.	C041156 (Super. Ct. No. 01F05511)

Defendant Paul William Hack appeals his conviction for one count of lewd and lascivious conduct. (Pen. Code, § 288, subd. (a).) Defendant contends that he received ineffective assistance of counsel by virtue of counsel's failure to renew a previously overruled pretrial objection to the admission of propensity evidence, and that the trial court abused its discretion in admitting various exhibits of adult materials. We disagree and shall affirm the judgment.

STATEMENT OF FACTS

Ten-year-old Nicole lived with her mother and brother in a Sacramento apartment. She had become friends with a number of

neighbors at the apartment complex, including defendant. In May 2001 Nicole was visiting defendant when he began touching her, nibbled on her ear, touched her chest, placed his hand under her overalls, touched her vagina, and asked if she wanted to look down his pants. Nicole ran home and told her mother what had happened. The two also reported the incident to the apartment manager.

Defendant admitted to the investigating officer that he had given Nicole a neck massage but denied touching her inappropriately. He also indicated he drank approximately seven beers beginning at 11:30 a.m.

Doug A. lived directly across from defendant. He saw Nicole sitting between defendant's legs on the porch and thought it did not look right. He saw defendant reach around Nicole and hold her chest with his hands. Another neighbor, Johnny P., also saw Nicole sitting on defendant's lap and saw defendant kiss Nicole on the cheek when she got up. He did not see defendant touch Nicole's chest or place his hands inside her overalls.

Pursuant to Evidence Code section 1108, three girls, Cecilia, Shantal, and Christianna, testified to a 1998 incident. At the time, they were 11 and 12 years old.

Cecilia testified that in 1998 defendant had been her babysitter. She, Shantal, and Christianna went to his apartment; Christianna left, and Cecilia and Shantal watched an X-rated videotape. Defendant started the videotape, and after about 15 minutes, he turned off the videotape and asked the

girls to do a striptease dance for him. Cecilia testified they danced but she only took off her shorts, exposing her bikini bottoms, and Shantal lifted up her shirt, exposing her bra. Cecilia also testified that defendant had touched her breast and vagina on approximately six other occasions. She did not report this conduct because she was too ashamed.

Shantal corroborated Cecilia's account of defendant's watching the videotape with the girls for approximately 15 minutes. She also testified that she and Cecilia "were naked" while dancing.

Christianna also testified that she, Cecilia, and Shantal watched a pornographic videotape for 15 minutes at defendant's apartment. Christianna's mother then came and Christianna left.

The apartment complex manager testified that defendant regularly held garage sales in front of the apartment complex. During these sales, he would display X-rated videotapes and magazines, as well as sex toys. These items could be observed by the children in the complex.

Defendant claimed that Nicole visited him and his fiancée almost daily. He stated he offered to rub Nicole's head and neck because she complained of having a headache and dizziness. He denied ever touching Nicole's chest or putting his hands inside her coveralls and said she became "mopey" when his fiancée asked her to leave. Defendant's fiancée confirmed she asked Nicole to leave, and stated she witnessed the interaction between defendant and Nicole and saw nothing inappropriate.

Regarding the 1998 adult videotape incident, defendant claimed Cecilia started the videotape when he was on the patio, and he became aware the videotape was playing when he came into the apartment to get a beer. He denied asking the girls to dance or to do a striptease, and denied ever molesting Cecilia.

Defendant admitted selling adult materials at garage sales in front of the apartment complex but denied selling sex toys there. He did, however, sell sex toys from his apartment, which was not accessible to young children.

Defendant was charged with two counts of committing a lewd or lascivious act on a child under the age of 14. (Pen. Code, § 288, subd. (a).) It was further alleged as to one count that defendant had engaged in substantial sexual conduct with a child under the age of 14. (Pen. Code, § 1203.066, subd. (a)(8).) In addition, it was alleged defendant had sustained prior convictions of rape and assault with intent to kill in Pennsylvania in 1959, and rape in Colorado in 1976. (Pen. Code, §§ 667.71, 667.61, subds. (a) & (d).)

The People filed an in limine motion seeking to introduce one prior conviction and the uncharged sexual offenses pursuant to Evidence Code section 1108.[1] The trial court granted the motion with respect to the 1998 incident involving Cecilia, Shantal, and Christianna. The trial court also ruled that the facts of two of defendant's prior convictions were admissible to

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[1] All further statutory references are to the Evidence Code.

impeach him but ruled the nature of the convictions was inadmissible. The court also ruled the Colorado rape was inadmissible to show propensity.

The jury convicted defendant of one count of lewd and lascivious conduct and was unable to reach a verdict on the other count and on the substantial sexual conduct allegations. In bifurcated proceedings, the court found the prior conviction allegations true. Defendant was sentenced to an aggregate term of 90 years to life.

DISCUSSION

I

Defendant argues on appeal that trial counsel rendered ineffective assistance by failing to renew his objection to the admission of propensity evidence under section 1108. Specifically, he complains about the admission of the 1998 incident with Shantal, Christianna, and Cecilia and the testimony of the apartment manager regarding the sale of adult materials at garage sales.

The People's moving papers indicated that in March 1998, "three twelve-year-old girls (Shantal, Cecilia and Christianna) went to the defendant's apartment to play. The defendant put an adult sex video in the VCR and watched it with the girls. The video depicted men and women having sex together. After watching the video for about 15 minutes, Christianna left. Cecilia and Shantal then began stripping their clothes off and danced nude in front of the defendant. He encouraged them by

saying they were ‘sexy little girls’ and not to worry because he has seen female parts before.”

Defendant does not now contend that, based on this offer of proof, the trial court’s ruling was in error. Rather, defendant contends the actual trial testimony did not meet this offer of proof, and therefore, trial counsel should have renewed the objection to this evidence. We disagree.

Shantal testified that she, Christianna, and Cecilia went to defendant’s apartment in 1998 and started watching television. She told Cecilia to look for a scary movie, but they ended up watching a pornographic movie, with naked men and women having “all kinds” of sex. Defendant watched the videotape with them for about 15 minutes. She thought Cecilia put the videotape in. After watching the videotape, Cecilia and Shantal started stripping in front of defendant. Christianna was not there when they were stripping. Defendant watched them strip and dance for about 10 minutes. The girls ended up completely naked. Defendant did not speak to them while they were dancing. Shantal asked Cecilia if it was all right, and she said it was “because he was a doctor. He’s already seen female parts before.” She did not remember defendant’s saying they were sexy little girls.

Cecilia testified that she, Shantal, and Christianna went to defendant’s in 1998. After they ate, one of the girls wanted to watch a movie, so defendant turned on an X-rated movie that was already in the videocassette recorder. She believed Christianna had left before the movie was played. The movie was

on for about 15 minutes and depicted men and women engaging in oral and anal sex. Defendant turned off the videotape, the radio was turned on, and defendant asked them to do a striptease. The girls danced for about three minutes. Cecilia took off her shorts and Shantal lifted her shirt, but they did not get completely naked. Defendant did not say anything to them while they danced.

Christianna testified that she, Shantal, and Cecilia went to defendant's apartment. Either Cecilia or defendant turned on a pornographic movie, which they watched for five to 15 minutes. While the movie was playing, defendant was watching the girls and watching the videotape. After they finished watching the movie, Christianna left.

The evidence at trial did not fall far short of the pretrial offer of proof. All three girls testified that they watched a pornographic videotape with defendant for approximately 15 minutes and that the videotape depicted various sexual acts between men and women. One testified that defendant put the videotape in, and another testified it was Cecilia who started the videotape. The two girls who remained testified that after watching the pornographic movie they did a striptease for defendant. One testified they got completely naked, and the other testified defendant asked them to do the striptease. Thus, the only portion of the offer of proof that was not met by trial testimony was that defendant encouraged the girls' dancing by telling them they were sexy little girls. Contrary to defendant's claim on appeal, even without the statement that

they were sexy little girls, the trial testimony sufficiently matched the offer of proof to suggest defendant had a "propensity to be attracted to young, prepubescent, girls."

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288 (*Lewis*).) "[W]here the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed." (*People v. Pope* (1979) 23 Cal.3d 412, 425.)

Here, as defendant concedes, the trial court properly ruled, based on the offer of proof, that the evidence was admissible. The testimony elicited at trial substantially matched the offer of proof. Accordingly, there was no sound legal basis for renewing the objection, and any renewed objection would have been futile. "Because there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance." (*People v. Cudjo* (1993) 6 Cal.4th 585, 616.) Further, "[c]ounsel may not be criticized for failing to bring a motion that would have been futile." (*Lewis*, *supra*, 50 Cal.3d at p. 289.)

II

Defendant also claims trial counsel was ineffective for failing to object to the testimony of the apartment manager regarding the sale of adult materials at garage sales. He contends this evidence should not have been admitted under section 352.

The apartment manager testified that defendant conducted garage sales on the front lawn of the complex. Included in the items for sale were X-rated movies, X-rated magazines, and sex toys. She also testified she saw children going through the items.

We have set forth the standard a defendant must meet to establish ineffective assistance of counsel above. "[E]ven when there was a basis for objection, '"[w]hether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence." (*People* v. *Hayes* (1990) 52 Cal.3d 577, 621 [276 Cal.Rptr. 874, 802 P.2d 376].) "In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." (*People* v. *Ray* (1996) 13 Cal.4th 313, 349 [52 Cal.Rptr.2d 296, 914 P.2d 846].)' [Citation.]" (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

Here, counsel was not asked for an explanation of his decision not to object to the apartment manager's testimony.

Assuming for the sake of argument that had counsel objected the trial court would have sustained the objection, we can conceive of a reasonable tactical decision. The apartment manager's testimony was brief and not especially inflammatory. Counsel may have chosen not to emphasize this testimony by objecting to it.

Furthermore, "[i]f a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. [Citation.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123 (*Kipp*).)

"In determining whether an attorney's conduct so affected the reliability of the trial as to undermine confidence that it 'produced a just result' [citation], we consider whether 'but for' counsel's purportedly deficient performance 'there is a reasonable probability the result of the proceeding would have been different.' [Citations.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 263.) Here, there was no such reasonable probability.

The apartment manager's testimony regarding the garage sales was not so inflammatory that its admission necessarily prejudiced defendant. This is especially so when considered in light of the other evidence of defendant's inappropriate sexual conduct toward young girls as testified to by Cecilia, Shantal, and Christianna. Defendant has not established that there was no rational tactical basis for counsel's decision not to object to the apartment manager's testimony or that there was any

prejudice in the admission of this evidence. We reject his claim of ineffective assistance of counsel.

III

Defendant's final contention is that the trial court abused its discretion in allowing the prosecution to display some of the specific adult material found in defendant's apartment as well as a piece of paper with Cecilia's name, address, and phone number on it. He contends the admission of this material was more prejudicial than probative.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] . . . [¶] . . . the error or errors complained of resulted in a miscarriage of justice." (§ 353.) "[A] miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. [Citation.] (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1170.)

We agree with defendant that the admission of the piece of paper with Chantal's address and phone number on it had little probative value. We fail to understand, however, and defendant does not articulate, how he was prejudiced by the paper's admission. For purposes of section 352, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"'

without regard to its relevance on material issues." (*Kipp*, *supra*, 26 Cal.4th at p. 1121.) The evidence simply was not prejudicial under this standard, and its admission does not rise to the level of a miscarriage of justice.

As to the adult materials found in defendant's apartment, we will assume without deciding the issue that it was error to admit these items. However, the jury was specifically instructed that these items were admitted for the limited purpose of corroborating the apartment manager's testimony, as well as the testimony of Cecilia, Christianna, and Shantal, that such material was in defendant's apartment. We presume the jury follows limiting instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) In the absence of any evidence rebutting that presumption, we cannot find the admission of this evidence resulted in a miscarriage of justice.

DISPOSITION

The judgment is affirmed.

RAYE, Acting P.J.

We concur:

MORRISON, J.

HULL, J.