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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR JUAREZ,

Defendant and Appellant.

A136912

(Contra Costa County  
Super. Ct. No. 51102003)

Appellant Oscar Juarez was sentenced to prison for a term of 25 years to life after a jury convicted him of two counts of sodomy with a child 10 years of age or younger and three counts of attempted sodomy with a child 10 years of age or younger. (Pen. Code, §§ 288.7, subd. (a),<sup>1</sup> 664.) He argues the three counts of attempt must be reversed because (1) the crimes, if committed, were completed acts of sodomy rather than attempts; and (2) the jury instructions erroneously suggested attempted sodomy was a general intent crime rather than a specific intent crime. We affirm.

I. BACKGROUND

Seven-year-old John Doe lived with his mother, stepfather and sister in a two-bedroom apartment in Walnut Creek. Appellant, a relative of Doe's stepfather, shared one bedroom with his brother N. while Doe's family slept in the other.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated. Section 288.7, subdivision (a) provides, "Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life."

On August 1, 2010, Doe told his mother appellant “took his pants down” and did “gross things to me.” Doe was taken to John Muir Medical Center for an examination, where he told the emergency room registration clerk, “This guy is taking off my clothes and putting his private parts in my butt.” Doe told an emergency room nurse he had pain when he walked and went to the bathroom, and his buttocks had been hurting for several days.

Doe was initially examined by Dr. Fitzgibbons, an emergency room physician, and told her he had been sexually abused by “Oscar” (appellant), who was his stepfather’s uncle. He said the assaults had been occurring “every day,” usually while his stepfather was working and his mother was sleeping. Doe told Fitzgibbons appellant would take him into the bedroom, lock the door, close the curtains, and put his penis in Doe’s bottom, telling Doe not to say anything. During her examination of Doe, Fitzgibbons noted his anus appeared to be dilated and abnormal.

Officer Keagy of the Walnut Creek Police Department was dispatched to the hospital to investigate Doe’s report of sexual abuse. Doe told Keagy his uncle “Oscar” (appellant) had put his penis in his buttocks, and that it hurt. Doe said he told appellant it hurt, but he would not stop. When Keagy asked Doe how many times this had happened, Doe counted to five on his fingers and then looked up and said 70 times. Doe told Keagy appellant had told him not to tell anyone or he would keep hurting him.

A sexual assault response team (SART) examination was conducted by Anamaree Rea, a nurse, and a pediatrician. Doe told Rea appellant had thrown him on the bed, pulled down his pants, and put his “ding ding” in Doe’s butt. He said appellant had done this a lot and it had been happening since before his school let out in June. Doe gave a similar history to the pediatrician. The physical findings of the examination included redness between the anus and scrotum and abnormal anal dilatation, which were consistent with sodomy.

Doe gave a taped statement at the Children’s Interview Center (CIC), in which he said appellant had pulled down his pants and put his “ding-a-ling” in Doe’s butt. Doe recounted that “pee” went in his butt and “poo” and “pee” “came out from my butt” when

he went to the bathroom. According to Doe, the sodomy happened “a lot of times.” Doe described an incident in which he “grab his ding-a-ling and I turn it like this and it hurted,” which allowed him to get away.

Appellant was arrested and brought to the police station for a videotaped interview, in which he initially denied everything, but eventually admitted he “did it.” Appellant said he did not “force” or “abuse” Doe, and claimed the sodomy happened only once. He said he loved Doe, who initiated their “relations” by massaging appellant’s back after closing the window and door of the bedroom. Appellant said he used a condom.

The district attorney filed an amended information charging appellant with five counts of sodomizing a child under 10 years of age in violation of section 288.7, subdivision (a). The case proceeded to a jury trial.

Doe was called as a witness at trial, and though he was initially reluctant to describe the sexual assaults, he eventually testified appellant had put his penis in Doe’s butt “four or more” times. Doe testified the assaults occurred in appellant’s bedroom, and though Doe had asked appellant to stop, he would not. Doe’s prior statements to hospital personnel and Keagy were introduced into evidence, as was his CIC interview.<sup>2</sup>

Dr. Carpenter, an expert in child sexual abuse, had reviewed the report of the SART examination conducted on Doe and had spoken with Rea about the examination. He noted the body of a child subjected to ongoing sodomy tends to adapt. Doe had exhibited “immediate,” “significant,” and “dramatic” anal dilatation, suggesting a history of sodomy. Toluidine blue, a dye, had been applied during the examination, and its “uptake” suggested a relatively recent abrasive injury. In Carpenter’s opinion, those circumstances, along with the redness noted in the area between Doe’s anus and scrotum, were “consistent with a history of recent sodomy and also consistent with the possibility of sodomy in the past. [¶] . . . [¶] [T]he other thing that supports that this is probably not the first time he was sodomized is the fact that he did not sustain more injuries. [¶] If this

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<sup>2</sup> The trial court ruled the various out-of-court statements by Doe were admissible under Evidence Code sections 1253 and/or 1360, a ruling not challenged on appeal.

was his single and only sodomy there is a great chance he would have sustained more injuries than were evident on this exam.”

Appellant did not testify at his trial. His counsel argued the prosecution had not proved its case because appellant’s confession was obtained through coercion and the result of the SART examination was not conclusive of sodomy. The defense presented the testimony of a physician and SART expert who believed the results of Doe’s SART examination were normal. However, the expert acknowledged these “normal” results were consistent with Doe’s disclosures of ongoing sodomy.

The jury was instructed on attempted sodomy with a child under 10 years of age, in violation of sections 288.7, subdivision (a) and 664, as lesser included offenses of each of the charged offenses. It found appellant guilty of two counts of sodomy as charged, and three counts of attempted sodomy as lesser included offenses. The court sentenced appellant to 25 years to life on one sodomy count and ordered the sentences on the remaining counts to run concurrently.

## II. DISCUSSION

### a. *Sufficiency of the Evidence of Attempt*

Appellant argues the three counts of attempted sodomy must be reversed as unsupported by substantial evidence; that is, evidence that is reasonable, credible and of solid value, from which a reasonable trier of fact could have found the prosecution sustained its burden of proving guilt beyond a reasonable doubt. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Appellant does not dispute the evidence was sufficient to show five *completed* acts of sodomy, but claims no reasonable trier of fact could have found he committed acts constituting an attempt. We disagree.

Sodomy is defined as “sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.” (§ 286, subd. (a).) A criminal attempt requires “the specific intent to commit the target crime . . . , and a direct but ineffectual act, beyond mere preparation, done towards its commission.” (*People v. Booker* (2011) 51 Cal.4th 141, 175; see § 21a.)

Appellant claims no evidence was presented to support a conviction of an attempt, because Doe never described any ineffectual act done toward the completion of sodomy. He also argues the evidence did not support an inference he harbored a specific intent to commit sodomy on any particular occasion.

Appellant's argument is foreclosed by section 663, which provides, "Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the Court, in its discretion, discharges the jury and directs such person to be tried for such crime." From the evidence presented, the jury could have reasonably concluded that on at least five occasions, appellant penetrated Doe with his penis and committed sodomy. Under section 663, that same evidence supported a conviction of an attempt to commit sodomy on each count, even though the sodomy itself was accomplished. (*People v. Esposti* (1947) 82 Cal.App.2d 76, 78 [upholding attempted rape conviction where "actually the rape itself was accomplished"].)

We also reject appellant's claim the evidence was insufficient to show he acted with the specific intent to commit sodomy as required for the attempt counts. "[E]vidence tending to prove that the crime was completed, even though not absolute proof of the crime of attempt, gives rise to a reasonable inference that the perpetrator intended to commit that crime." (*People v. Rundle* (2008) 43 Cal.4th 76, 138, fn. 28, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn 22.) It is difficult to imagine how a person could forcibly sodomize a young child without specifically intending to do so. Doe's description of the sexual assaults he suffered at appellant's hands was more than adequate to prove appellant acted with specific intent.

#### b. *Jury Instructions on Intent*

Appellant argues his three convictions for attempted sodomy in violation of sections 288.7 and 664 must be reversed because the jury was not advised an attempt requires proof of specific criminal intent. We conclude any error in this regard was harmless.

As appellant notes, an attempt requires the specific intent to commit the target offense, even if the crime attempted does not require a specific intent. (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 710.) Thus, while sodomy as defined in section 288.7, subdivision (a) is a general intent crime, an attempted violation of that statute requires proof of specific intent. A trial court has a sua sponte duty to give an instruction on the necessary concurrence of act and specific intent when such intent is a necessary element of a crime. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220.)

Here, the court gave CALCRIM No. 250, defining the concurrence of act and intent necessary for general intent crimes, and extended this definition to attempted violations of section 288.7: “The crimes or other allegations charged in this case require proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crimes in this case of sexual acts with a child ten years of age or younger as charged in Counts 1 through 5, or the lesser offenses of attempted sexual acts with a child ten years of age or younger, . . . that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law.”

Though CALCRIM No. 250 did not accurately state the intent required for attempted sodomy, CALCRIM No. 460 correctly defined the elements of attempted sodomy to require a specific intent to commit the target offense: “A lesser crime to the crime charged in Counts 1 through 5 is attempted sexual acts with a child ten years of age or younger. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing sexual acts with a child ten years of age or younger. [¶] AND [¶] 2. The defendant intended to commit sexual acts with a child ten years of age or younger. [¶] . . . [¶] To decide whether the defendant intended to commit sexual acts with a child ten years of age or younger, please refer to the separate instructions that I have given you on that crime.” The court gave a version of CALCRIM No. 1127 that defined the elements of a section 288.7 violation based on an act of sodomy.

In assessing appellant’s claim of error regarding the element of specific intent, we “must consider the instructions as a whole to determine whether there is a reasonable likelihood the jury applied the instructions in an unconstitutional manner.” (*People v. Loy* (2011) 52 Cal.4th 46, 74.) Specific to this case, we must determine whether it is reasonably likely the jury would have convicted appellant of three counts of attempted sodomy absent a determination he specifically intended to sodomize Doe. We conclude there was no reasonable likelihood, because CALCRIM No. 460 advised the jury a specific intent was required.

CALCRIM No. 250 told the jury that in order to convict appellant of an attempted violation of section 288.7, it needed to find he acted with a “wrongful intent” by intentionally doing a prohibited act. This did not contradict CALCRIM Nos. 460 and 1127, which correctly advised the jury that an attempted violation of section 288.7 must in this case include a specific intent to commit sodomy. Though the court should not have explicitly extended CALCRIM No. 250 to attempts, and would have been well advised to give the standard instruction regarding the concurrence of act and specific intent with respect to attempts,<sup>3</sup> the jury was not misled. (See *People v. Poslof* (2005) 126 Cal.App.4th 92, 100-101 (*Poslof*) [in prosecution for failure to register as a sex offender, which required knowledge of registration requirement rather than general criminal intent, jury was not misled by general intent instruction when it would have understood from instructions as a whole that it must find defendant acted with the necessary knowledge].)

Moreover, the court’s extension of CALCRIM No. 250 to attempts was harmless beyond a reasonable doubt. (*People v. Barker* (2004) 34 Cal.4th 345, 361; *Poslof, supra*,

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<sup>3</sup> CALCRIM No. 251 defines the concurrence of act and intent necessary for a specific intent offense and would have advised the jury that attempted sodomy “require[s] proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crime[s], . . . that person must not only intentionally commit the prohibited act . . . , but must do so with a specific intent. . . . The act and the specific intent . . . required are explained in the instruction for that crime . . . .” (See *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1324 & fn. 27.)

126 Cal.App.4th at p. 101.) If appellant acted in the manner described by Doe, he would have necessarily harbored a specific intent to commit sodomy. The defense at trial was not that appellant lacked such an intent, but that he did not commit the acts at all. (*Barker*, at p. 361 [in prosecution for failing to register as a sex offender, instruction on general intent was harmless when evidence showed the defendant knew of his obligation to register and defense counsel did not claim the contrary in trying the case].)

### III. DISPOSITION

The judgment is affirmed.

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NEEDHAM, J.

We concur.

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SIMONS, ACTING P.J.

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BRUINIERS, J.