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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re B.A., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

B.A.,

Defendant and Appellant.

A137900

(Alameda County
Super. Ct. No. SJ12019451-01)

The juvenile court found that defendant B.A., already a ward of the court, had committed two misdemeanors: sexual battery as defined by Penal Code section 243.4, subdivision (a), and battery on school property (Pen. Code, ¹ § 243.2). The court ordered defendant placed in a suitable foster home, private institution, or group home/county facility, set his maximum term of confinement (MTC) at one year eight months, and awarded him 64 days of custody credit.

Defendant contends: (1) there is insufficient evidence to support the finding he violated section 243.4, subdivision (a) because he did not touch the skin of an intimate part of the victim; (2) assuming the evidence does support the lesser-included offense of section 243.4, subdivision (e), sexual battery without such skin contact, section 654

¹ Subsequent statutory references are to the Penal Code unless otherwise indicated.

precludes double punishment for that sexual battery and the battery on school property; and (3) he is entitled to one additional day of custody credit.

The Attorney General concedes issue (1) and we conclude, as defendant essentially agrees, the evidence supports a finding he committed a violation of section 243.4, subdivision (e). We disagree with defendant regarding issue (2), but agree with him regarding issue (3). We will modify the findings and orders of the juvenile court accordingly, as set forth below, and otherwise affirm.

I. PROCEDURAL HISTORY & FACTS

The prior wardship proceeding. On August 15, 2012, the People filed a delinquency petition (Welf. & Inst. Code, § 602, subd. (a)) alleging defendant, who was not quite 15 years old, committed three offenses including felony auto burglary (§ 459). On September 4, 2012, defendant admitted the auto burglary allegation, as reduced to a misdemeanor, and the remaining two allegations were dismissed. The court set defendant's MTC at one year. On October 4, 2012, the juvenile court declared defendant a ward of the court and placed him on probation under home supervision.

The present wardship proceeding. The present offenses occurred just over a month after defendant was declared a ward of the court.

On November 6, 2012, both defendant and the victim, G.L., were students at the same high school. G.L. had a third period band or music class from 10:00 a.m. to 11:48 a.m. Before the class started, she and a few friends went into one of three small rooms adjacent to the large band classroom. Her friends left her alone in the room about an hour later.

G.L. started playing her guitar. Defendant came into the room and closed the door. G.L. said, "Why are you in here? I'm practicing." Defendant told her to "be cool." Defendant opened the door, looked around outside for about 20 seconds, and shut the door again. He went up to G.L. and grabbed her wrists with both hands. He then let go and grabbed her breast for about 20 seconds.

G.L. pushed defendant away. She was only able to push him "not very far." Defendant approached her again, forced her against a wall with his body, and then

touched her on her thigh. He moved his hand toward her vaginal area and touched her there for about two minutes. G.L. screamed, "Move!" and again tried to push defendant away.

Defendant asked G.L., "Why are you acting like that?" He unzipped his pants and pulled them down to his thighs, removed his penis, and placed it against G.L.'s leg. He pressed his penis against her vaginal area and asked her to touch it. G.L. could not see defendant's penis because it was hidden by his shirt, but she could feel that it was erect. Although she didn't actually see defendant's penis she agreed "it appear[ed] that it was sticking out from behind his T-shirt."

G.L. screamed and pushed defendant again. He prevented her from leaving the room. A few minutes later a friend of G.L.'s came, saw her crying, and took her out of the room.

It is undisputed defendant did not remove any of G.L.'s clothing. Of significance to the first issue on appeal, it is equally undisputed defendant did not touch the skin of any intimate part of G.L. The juvenile court so noted.

Defendant testified and denied the incident.

The People charged defendant with sexual battery involving touching the skin of an intimate part of the victim (§ 243.4, subd. (a), count 1); false imprisonment (§ 236, count 2); indecent exposure (§ 314.1, count 3); and battery on school property (§ 243.2, count 4). Counts 1 and 2 were alleged as felonies, while counts 3 and 4 were alleged as misdemeanors.

After the jurisdictional hearing, the juvenile court found that defendant had committed a violation of section 243.4, subdivision (a), as charged in count 1, but reduced the offense to a misdemeanor. The court also found defendant had violated section 243.2, as charged in count 4. The court made no findings on counts 2 and 3. The court found the count 1 violation "was when [defendant] touched the breast and vagina area" and the count 4 violation "was when he grabbed the wrists." The juvenile court found these were "separate incidents." The court set defendant's MTC at one year eight months.

At the dispositional hearing, the juvenile court ordered defendant placed in a suitable foster home, private institution, or group home/county facility. The court awarded defendant 64 days of custody credit.

II. DISCUSSION

Defendant first contends there is insufficient evidence to support the finding he violated section 243.4, subdivision (a). The Attorney General concedes the point and we agree.

Section 243.4 defines various types of sexual battery. Subdivision (a) punishes “[a]ny person who touches an intimate part of another person . . . if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse” The statute defines “ ‘intimate part’ ” as “the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.” (§ 243.4, subd. (g)(1).) As used in subdivision (a) of the statute, “ ‘touches’ means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense.” (§ 243.4, subd. (f); see *People v. Elam* (2001) 91 Cal.App.4th 298, 309–310.)

It is uncontested defendant did not make physical contact with the skin of an intimate part of G.L., either directly or through his clothing. Thus, he cannot be guilty of violating section 243.4, subdivision (a). There is overwhelming evidence, however, that he violated section 243.4, subdivision (e), which punishes “[a]ny person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse. . . .” As used in this subdivision, “ ‘touches’ means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim.” (§ 243.4, subd. (e)(2); see *People v. Babaali* (2009) 171 Cal.App.4th 982, 995.)

Defendant “touched” intimate parts of G.L. through her clothing, and thus violated section 243.4, subdivision (e). The Attorney General so concludes and, as noted above,

defendant essentially agrees.² Given the state of the record, we exercise our power to amend the findings and orders of the juvenile court to reflect a violation of section 243.4, subdivision (e) as a lesser-included offense of section 243.4, subdivision (a). (See *People v. Daly* (1992) 8 Cal.App.4th 47, 57.)

Defendant next contends that, assuming he committed a violation of section 243.4, subdivision (e), section 654 prevents double punishment for that offense and the battery on school property, section 243.2, because the two offenses were part of an indivisible course of conduct. We disagree.

The basic principles of section 654 jurisprudence are well known. It suffices to say a defendant may not be punished for multiple criminal offenses when they are part of an indivisible course of conduct, but can be punished for the offenses if they are divisible, i.e., based on multiple criminal objectives intended by the defendant. (See, e.g., *People v. Latimer* (1993) 5 Cal.4th 1203, 1208–1209; *People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Defendant argues his battery on school grounds (the touching of the wrists) was done “in order to facilitate an ensuing sexual battery.” Thus, he argues, the wrist touching and the sexual battery were an indivisible course of conduct precluding double punishment. He concludes his MTC should, accordingly, be reduced from one year eight months to one year four months.

However, the juvenile court found the two offenses were divisible.³ That finding must be upheld if it is supported by substantial evidence. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717.) We find that it is, under the principle that multiple criminal acts “. . . ‘are not one transaction [i.e., are divisible] where the defendant had a chance to reflect between offenses and each offense created a new risk of harm.’ ” (*Ibid.*, quoting *People v. Felix* (2001) 92 Cal.App.4th 905, 915.) Defendant approached G.L. and

² In his opening brief, defendant admits the evidence “would not preclude a finding” that he “might have committed” a violation of section 243.4, subdivision (e). We view the state of the record rather more ingenuously.

³ The court found they were “separate incidents” and punished defendant for both.

grabbed her wrists. She pushed him away. He had the opportunity to reflect that his conduct was inappropriate and his physical contact unwanted, and to stop. Instead, he returned. He re-approached G.L., pinned her against the wall, and committed sexual battery by touching her vaginal area. The two offenses are divisible and he may be punished for both.

Defendant's MTC, however, is not the one year eight months set by the juvenile court, but rather one year six months. The juvenile court was entitled to consider the prior auto burglary, as well as the two new offenses in setting the MTC. If it chose to sentence consecutively, as it did here, the procedure is to start with the longest maximum term imposed for any of the offenses (the principle term) and then add one-third the middle term for the remaining offenses (subordinate terms), similar to the procedure used in adult sentencing. In the case of misdemeanors, the court would use one-third the maximum term to compute the subordinate term. (See *In re Eric J.* (1979) 25 Cal.3d 522, 536–538.)

The maximum term for misdemeanor auto burglary is one year. (§ 461, subd. (b).) Battery on school grounds, a misdemeanor, is punishable by up to one year (§ 243.2, subd. (a)(1)), making the subordinate term for this offense four months. A violation of section 243.4, subdivision (e), a misdemeanor, is punishable by a maximum of six months, making the subordinate term two months. Thus, defendant's MTC is one year six months and we shall modify the findings and orders of the juvenile court accordingly.

Finally, defendant contends he is entitled to an additional day of custody credit. He seeks credit for time spent in custody July 11, 2012, when he was arrested on the original auto burglary charge. The record shows he was held for three and one-half hours in a police station, where he was fingerprinted, photographed, *and booked* before he was eventually released. Defendant contends he is thus entitled to an additional day of credit.⁴

⁴ A partial day is treated as an entire day for custody credit purposes. (See *People v. Smith* (1989) 211 Cal.App.3d 523, 526.)

The Attorney General argues against the additional day of credit, contending defendant was only subjected to a “brief detention” in a police facility. We do not regard three and a half-hours in a secure police facility, especially involving the booking process, as a “brief detention.” This is especially true when the booking process has been described as the beginning of the confinement process in a correctional facility. (See *Zeilman v. County of Kern* (1985) 168 Cal.App.3d 1174, 1181.) And we note that, while Welfare and Institutions Code section 726, subdivision (d) defines “physical confinement” as confinement in various institutions, even the Attorney General admits “the phrase ‘physical confinement’ has also been interpreted to include county jail. (See *In re [Mikeal] D.* (1983) 141 Cal.App.3d 710, 721 [‘there is hardly anything more physically confining than jail’].)”

We thus conclude defendant is entitled to an additional day of custody credit.

III. DISPOSITION

The findings and orders of the juvenile court are modified as follows: (1) instead of a violation of section 243.4, subdivision (a), defendant committed a violation of section 243.4, subdivision (e); (2) defendant’s MTC is one year six months; (3) defendant is entitled to one additional day of custody credit for a total of 65 days. As so modified, the findings and orders of the juvenile court are affirmed.

Sepulveda, J.*

We concur:

Dondero, Acting P.J.

Banke, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.