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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT T. CURRY,

Defendant and Appellant.

C064918

(Super. Ct. No.
09F0001157)

Defendant Scott T. Curry was convicted by a jury of felony exhibiting harmful matter to a minor (A.F.) with intent to seduce. (Pen. Code, § 288.2, subd. (a); further statutory references are to this code.) The jury returned verdicts of not guilty on three counts of lewd and lascivious acts on a child under 14 years (§ 288, subd. (a)) and a second count of exhibiting harmful matter to another minor -- K.J. Defendant was granted probation with credit for time served.

On appeal, defendant contends (1) the evidence was insufficient to sustain his conviction, (2) the trial court

erred by failing to instruct the jury sua sponte on a lesser included offense, and (3) the court lacked authority to amend the judgment two weeks after it was entered and the notice of appeal was filed.

We conclude that only the last contention has merit. Therefore, we affirm the judgment and strike the order attempting to modify the judgment.

FACTUAL BACKGROUND

Between sometime in 2005 and August 2006, defendant lived in a house with his wife (Rochelle), their son (born in 2005), his wife's daughter (K.J., born in 2001), his wife's sister (Brandi) and her daughter (A.F., born in 1999). Defendant babysat A.F. and K.J. when their mothers were at work.

In 2008, A.F. disclosed to her mother that, when they lived with defendant, he showed K.J. and her "porn of women," told them about different sexual positions, touched her thigh and took pictures of them.

At trial in March 2010, A.F. testified that, on more than one occasion, defendant showed her and K.J. movies on the television about "S-E-X." A.F. said she had not spoken to her parents about sex or learned about it at school, and she did not know how to explain what "S-E-X" meant, although she stated that "one night . . . [defendant] told [her] about S-E-X" A.F. testified that the people in the movies were women and they were not wearing clothes. A.F. stated that defendant "showed us these movies and . . . he taught us about it and he showed us pictures of it."

According to A.F., defendant asked the minors "to copy what was going on in the movie," and K.J. and she copied "[t]he kissing" but not "all of" what happened in the movie. Defendant was not in the room when this occurred. One time when he showed them one of these movies, the minors did a fashion show for defendant, during which defendant took pictures of them. When A.F. was asked whether they were wearing clothes during the fashion show, she responded, "[s]ome clothes."

A.F. initially testified that defendant never touched her "in a private area" and she had never seen him touch K.J. in a "private spot." After she was reminded of a statement she made to a police officer, A.F. testified that one night she woke up and saw defendant touching K.J. "kind of by the private spots," and another night, she felt defendant touching her leg and saw him standing over her holding a camera. A.F. clarified that when she said "by her privates," she meant "by her butt."

According to A.F., once during the daytime, defendant came into their room and asked K.J. if she "[w]anted her privates licked," and K.J. stood on the bed without any clothes on while defendant lay on the bed and licked her "privates." A.F. denied that defendant ever licked her "privates." Defendant told A.F. not to tell anybody and that she would get in trouble if she did.

K.J. also testified. She said that defendant "touch[ed] [A.F.'s and her] private area[s] with his tongue" on more than one occasion. According to K.J., defendant was lying down, and A.F. and she were standing up and had no clothes on. K.J.

testified that their clothes had been taken off by their mothers.

Rochelle testified that defendant had "adult films" at the house on his computer and possibly on DVDs. According to Rochelle, in July 2008, A.F. told her that defendant had touched K.J. and her "in a very indecent manner" and that K.J. later verified this. K.J. also told her that defendant had them watch pornographic movies on the computer. A.F. told Rochelle that defendant had threatened them.

Rochelle testified that defendant "admitted to molesting" the minors and explained to her that he had "been fighting that feeling since he was 14." Defendant wrote a letter, which was admitted into evidence, stating that he remembered "playing dress-up" with the minors and that he did "not know how far it went" but that he thought he had "pushed it too far."

Brandi testified that, around the same time that A.F. made her initial disclosure to Rochelle, A.F. told her that, when they lived with defendant, he showed K.J. and her "porns of women and told them about different sexual positions," "[t]ried to take pictures of them at one point," "tried to touch her," and did touch her thigh.

Defendant was confronted by a police officer with the minors' accusation in July 2008. At that time, he stated that the minors entered his room on two occasions while he was watching pornography on his computer and thought the door was locked. He did not deny that he had molested the minors, and

when confronted with the accusation that he had touched the minors' genitals, he responded, "'If they say so, I must have.'"

When defendant was later interviewed by a police detective who was investigating the allegations, he stated that he did not remember touching either of the minors in a sexual way, but acknowledged that the minors "caught [him] watching porn." He testified that, during that period in his life, he "was just basically drunk all the time" and although he did not remember having "them watch a movie of two girls" or "act out the porn on each other," and did not remember touching them in a sexual way, it was possible it could have happened. When the detective asked defendant for a reason why it happened, defendant stated he was "a massive porn . . . person" and "had lots of porn." He stated: "I go through a lot of porn I almost go through that like I do alcohol." He said he has a problem with pornography, and he masturbates "[a]t least twice a day." When the detective asked him again why he thought "this happened," defendant stated: "Just drunk and stupid. Got excited, I was watching frikken, probably watching porn or something and then . . . they were there and they probably came in and caught me . . . while I was watching a porn."

The police detective testified that he also interviewed the minors in 2008 as part of his investigation. K.J. told him that defendant "touched her vagina with his tongue." K.J. did not tell him that defendant showed her any movies. A.F. told the detective that she had seen only one movie, and that defendant showed pornographic movies to K.J. "about 15 times." A.F.

reported that defendant did not "ma[k]e her and K[.J.] kiss" or "do anything" after watching the movies, and she did not tell the detective that she saw defendant lick K.J.'s "privates."

DISCUSSION

I

Sufficiency of Evidence

Section 288.2, subdivision (a) makes it a crime for an individual to knowingly exhibit "any harmful matter, as defined in Section 313" to a minor "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor" Defendant claims there was insufficient evidence that he exhibited "harmful matter" to A.F. and that he intended to "seduce" her, two of the elements of section 288.2, subdivision (a).

In determining the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Valdez* (2004) 32 Cal.4th 73, 104.) We presume the existence of every fact in support of the evidence that the trier of fact could deduce from the evidence, including reasonable inferences based on the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 58.)

Inferences reasonably deducible from the evidence constitute substantial evidence. The inferences need not be the

only ones the evidence supports, and the evidence of the ultimate fact in question need not be strong. (*People v. Wharton* (1991) 53 Cal.3d 522, 546; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

A. *Harmful Matter*

Defendant contends there was insufficient evidence that the movies in question constituted "harmful matter" for purposes of section 288.2. The contention is without merit.

Section 313 defines "[h]armful matter" as "matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." (§ 313, subd. (a).) This definition "essentially 'tracks' the three-prong test for obscenity articulated by the United States Supreme Court in *Miller v. California* (1973) 413 U.S. 15 [37 L.Ed.2d 419]," adding that the lack of serious artistic, political or scientific value must be evaluated with regard to minors. (*People v. Dyke* (2009) 172 Cal.App.4th 1377, 1382-1383 (*Dyke*).) "As to the first two prongs of the test for harmful matter, nothing in section 313 indicates that the 'average person' applying 'contemporary statewide standards' is anything other than an average adult applying adult standards, or that the determination of whether sexual conduct is depicted or described in a patently offensive way should be made using anything but

adult standards." (*Dyke, supra*, at p. 1383, italics & fn. omitted.)

"[I]n order to determine whether a portrayal of sex is patently offensive to the average adult, '[a] reviewing court must, of necessity, look at the context of the material, as well as its content.' [Citation.]" (*Dyke, supra*, 172 Cal.App.4th at p. 1385.) "[T]he question of what is 'patently offensive' under the community standard obscenity test is essentially a question of fact. [Citation.]" (*Id.* at p. 1384.)

In *Dyke*, the 16-year-old minor testified that, while she was at the house of a friend, the defendant, who was her friend's father, displayed what she referred to as "pornography" on the television while flipping through the channels. The minor remembered seeing a naked woman dancing for somewhere between one and eight minutes and, for around 45 seconds, the upper bodies of a naked man and woman who were "having sex" with the woman "on top." The defendant stated to the minor: "'I shouldn't have this on because then you will have funny dreams and feel funny.'" After the minor went to bed, defendant came in, rubbed her breast, kissed her mouth and asked her if she was "horny." In addition to being convicted of section 288.2, subdivision (a), the defendant was found guilty of misdemeanor sexual battery. (*Dyke, supra*, 172 Cal.App.4th at pp. 1380-1381, 1385.)

The appellate court held the evidence was insufficient to establish that the television images constituted "harmful matter" for purposes of section 288.2, subdivision (a), noting

that "nudity alone" and "portrayals of sexual activity" are not per se obscene, even as to minors and "even if they may be characterized as 'dismally unpleasant, uncouth, and tawdry.'" (*Dyke, supra*, 172 Cal.App.4th at pp. 1384-1385.) The court cited United States Supreme Court authority stating: "'[A]n essential First Amendment rule [is]: The artistic merit of a work does not depend on the presence of a single explicit scene.'" (*Id.* at p. 1386.) The court observed that, "in order to determine whether a portrayal of sex is patently offensive to the average adult, '[a] reviewing court must, of necessity, look at the context of the material, as well as its content'" and the record before it was missing "any context" from which it could be determined whether what was depicted was patently offensive to the average adult. (*Id.* at p. 1385.) The court concluded that, "[w]ithout more, neither we nor the jury are permitted to presume that such content [a nude woman dancing and a naked couple having sex, shown from the waist up] is patently offensive to the average adult, applying statewide community standards." (*Ibid.*) The court found the minor's reference to "pornography" equally lacking in evidentiary weight without any testimony "as to what she meant by that term, or how broadly it may have been intended." (*Ibid.*, fn. 5; see also *People v. Powell* (2011) 194 Cal.App.4th 1268, 1291 (*Powell*)). It noted additionally: "[I]t is not the minor's opinion that matters; the sexual conduct depicted must be judged patently offensive under a single contemporary statewide standard." (*Dyke, supra*, 172 Cal.App.4th at p. 1385, fn. 5.)

In *Powell, supra*, 194 Cal.App.4th 1268, the defendant was convicted of raping his daughter (who was 10 years old or younger) and exposing her to pornographic movies. (*Id.* at p. 1274.) With regard to the movies she was shown, the victim testified they depicted "girls and boys" with their penises and vaginas exposed, and they would engage in sexual activity. (*Id.* at pp. 1284-1286.) She also described the man in these movies uncovering his penis and "'put[ting] his penis in the vagina,'" but the penis was obscured by pixelization. (*Id.* at p. 1286.) Then they would have sex, which she could see and hear them perform. (*Ibid.*)

In evaluating the sufficiency of the evidence as to section 288.2, the appellate court noted that "nudity or depictions of sexual intercourse or other sexual activity do not, by themselves, make a movie obscene." (*Powell, supra*, 194 Cal.App.4th at p. 1291.) The court noted that in *Miller*, the Supreme Court held "'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed.'" [Citation.]" (*Powell, supra*, 194 Cal.App.4th at p. 1293.) The court in *Powell* observed: "*Miller* makes plain that 'hard-core pornography is synonymous with obscene pornography.'" [Citation.] 'Based on *Miller*, the law distinguishes between hard-core pornography and soft-core pornography, which involves depictions of nudity and limited and simulated sexual conduct. Because it is not as graphic or explicit as hard-core

pornography, soft-core pornography is protected under the First Amendment.' [Citation.]" (*Powell, supra*, at p. 1293.)

The appellate court in *Powell* concluded that, for the most part, the victim's description of the movies she was shown was insufficient to determine whether the material was "obscene." (*Powell, supra*, at p. 1293.) However, the victim's description of seeing a movie depicting people engaged in sexual activity in which "[p]lenises, breasts, and vaginas [were] featured in lewd displays" was sufficient to satisfy the "harmful matter" element of the offense. (*Id.* at p. 1295.)

In the present matter, defendant's statements and the statements of A.F. and K.J. to various people, along with reasonable inferences drawn from those statements, make it clear that what defendant showed A.F. was hard-core pornography.

Defendant admitted that he is a "massive porn . . . person" and that he "had lots of porn" and "[l]ots of self abuse . . . [m]asturbation . . . [a]t least twice a day." This is not a self-description of a person who has an extensive soft-core collection of artistic films. It can reasonably be inferred from defendant's own statements that his collection is of hard-core pornography, which also supports the inference that what he showed A.F. was hard-core pornography.

Defendant showed A.F. pornography involving nude women having sex and taught A.F. about different sexual positions. He asked A.F. and K.J. to copy what was going on in the movie, and they kissed but did not do everything portrayed in the movie. It can reasonably be inferred that, in teaching the girls about

sexual positions, defendant referred to the sexual depictions in the movies he showed to A.F., further supporting the inference that defendant showed A.F. hard-core pornography.

When questioned by the police officer, defendant admitted that the girls had entered the room when he was watching pornographic movies. He claimed he thought the door was locked. It can reasonably be inferred that, in the opinion of defendant, a man who is a "massive porn . . . person" with "lots of porn," the movies that he showed A.F. were not suitable for a child her age. He admitted as much in police questioning and added: "I do so much stupid shit when I'm drunk that it's not even funny."

Accordingly, even though these little girls did not describe in detail what they saw when defendant showed them pornographic movies, the evidence, as a whole, supports inferences that it was hard-core pornography, the type deemed harmful by section 313, subdivision (a). In that way, this case is different from *Dyke*, in which the only evidence of the allegedly harmful matter was that there was nude dancing and a depiction from the waist-up only of a couple having intercourse. And it is more like *Powell*, in which graphic depictions of sexual activity, though pixelated, supported a finding that the matter was harmful under section 313, subdivision (a).

We conclude that there was sufficient evidence that the matter was harmful.

B. *Intent to Seduce*

Defendant also contends there was insufficient evidence that he intended to seduce A.F. This contention is also without merit.

"[T]he 'seducing' intent element of the offense requires that the perpetrator intend to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor." (*People v. Jensen* (2003) 114 Cal.App.4th 224, 239-240 (*Jensen*)). The intent must be to "'entic[e] to sexual intercourse,'" i.e., "'intercourse involving genital contact between individuals,'" although the defendant need not have intended "'heterosexual intercourse involving penetration of the vagina by the penis.'" (*Id.* at p. 239.)

Defendant maintains there was insufficient evidence that he intended to seduce A.F. because there was no evidence that he intended to have sexual intercourse with her when he showed her the movies in question. He maintains the evidence established only that he intended A.F. to engage in physical contact with K.J., not with him, as the movies depicted physical contact between women only and he asked the minors to copy what they had seen in the movies.¹ We disagree.

¹ Even though defendant was acquitted of the molestation charges, we need not ignore the facts supporting those charges in considering whether there is sufficient evidence that defendant intended to seduce A.F. "[T]he criminal justice system must accept inconsistent verdicts as to a single defendant. [Citation.] . . . '" . . . [A] criminal defendant

There was ample evidence that defendant touched A.F.'s genitals and, thus, sufficient evidence that he showed her the movies with the intent to seduce her. He made his intentions concerning A.F. known by his actions.

The evidence established that defendant possessed pornographic films and that he showed A.F. a movie involving two naked women. Defendant asked the minors "to copy what was going on in the movie," and, according to A.F., K.J. and she copied "[t]he kissing" but not "all of" what happened in the movie. A.F. disclosed to her mother that defendant told K.J. and her about different sexual positions, and A.F. testified that defendant told her about "S-E-X." When A.F. was asked what defendant had done that he was not supposed to do, she testified that he "showed us these movies and . . . he taught us about it and he showed us pictures of it."

already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary." [Citation.]" (*People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 13.)

The evidence of defendant's physical contact with the K.J. was relevant to his intentions with respect to A.F. A.F. woke up and saw defendant touching K.J. legs and privates. Another time, defendant licked K.J.'s privates.

And of course, defendant's actual contact with A.F. was evidence of his intent. He touched her thigh when she pretended to be asleep.

Finally, defendant admitted to molesting the girls, even if he denied "penetrating" them. And he admitted that he had the propensity toward molesting little girls since he was 14. When asked whether he had touched the girls' genitalia, he said: "If they say so, I must have."

Together with the nature of the movies defendant showed A.F., this evidence supports an inference that defendant showed A.F. the movies with the intent to seduce her.

II

Lesser Included Instruction

Defendant also claims the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of misdemeanor distributing harmful matter to a minor. (§ 313.1, subd. (a).)

Section 313.1, subdivision (a), makes it a crime to "knowingly sell[], rent[], distribute[], send[], cause[] to be sent, exhibit[], or offer[] to distribute or exhibit by any means . . . any harmful matter" to a minor. Violation of section 313.1, subdivision (a) is a lesser included offense of section 288.2, subdivision (a), which adds the requirements that

the distribution of the harmful material was for the purpose of arousing the victim or the perpetrator and with the intent to seducing the victim. (*Jensen, supra*, 114 Cal.App.4th at p. 244.)

"[E]ven absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118.) "[A] failure to instruct sua sponte on a lesser necessarily included offense supported by the evidence violates the defendant's 'constitutional right to have the jury determine every material issue presented by the evidence.' [Citations.]" (*Id.* at p. 119.)

However, a trial court is under no duty to instruct sua sponte on a lesser included offense which is time-barred. (*Spaziano v. Florida* (1984) 468 U.S. 447, 454-457 [82 L.Ed.2d 340, 348-350]; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 376; *People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1658; cf. *Jensen, supra*, 114 Cal.App.4th at p. 245 [a defendant can obtain an instruction on a lesser included offense by requesting an instruction and waiving the statute of limitations].)

"A prosecution for a misdemeanor offense 'shall be commenced within one year after commission of the offense.' (Pen. Code, § 802, subd. (a).) A prosecution 'is commenced when any of the following occurs: [¶] (a) An indictment or information is filed. [¶] . . . [¶] (d) An arrest warrant or

bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.' (Pen. Code, § 804.)" (*Jensen, supra*, 114 Cal.App.4th at p. 245, fn. 15.)

Here, the crime was committed, at latest, in August 2006. There is nothing in the record indicating that the prosecution commenced before 2009. Accordingly, the statute of limitations had run on a possible section 313.1 misdemeanor offense. Because the statute of limitations had run on the misdemeanor offense when the prosecution commenced and defendant did not request an instruction on the lesser offense and waive the statute of limitations bar, the trial court had no duty to instruct the jury on this offense.

III

Modification of Judgment

Defendant contends the trial court erred by amending the minute order from his sentencing hearing. We agree.

The probation report prepared for sentencing in defendant's matter recommended that imposition of sentence be suspended and defendant be placed on probation but that the upper term was recommended if defendant "find[s] himself facing a prison term in the future." At sentencing, on May 3, 2010, the trial court announced that its tentative decision was to follow the recommendation in the probation report. The People agreed to the recommendation, and the court followed it, suspending imposition of sentence and admitting defendant to formal

probation for three years with numerous terms and conditions. The minute order from the hearing so reflected.

Two weeks later, however, and without a hearing, the minute order was amended to add: "AS PENALTY THEREFORE, THE COURT ORDERS that the defendant is sentenced to STATE PRISON for the base term of THREE (3) YEARS." As in the original minute order, the amended order then states that imposition of sentence is suspended and defendant is admitted to probation.

We agree with defendant that the court acted in excess of its jurisdiction by amending the minute order in this manner. The amended minute order from the sentencing was not a proper nunc pro tunc order, because even if the trial court had intended to suspend execution of a three-year prison term, it did not do so at the time of defendant's sentencing, rendering the error, if any, judicial rather than clerical. (See *In re Daoud* (1976) 16 Cal.3d 879, 882.)

Nor is there any merit to the People's contention that the trial court retained power to modify probation under section 1203.3, subdivision (a). That section provides that the court has authority to revoke, modify or change its order of suspension of imposition or execution of sentence at any time during the term of probation. However, as pointed out by defendant, the court is required to hold a noticed hearing before modifying probation. (§ 1203.3, subd. (b)(1).) Furthermore, "[a] change in circumstances is required before a court has jurisdiction to extend or otherwise modify probation. . . . 'An order modifying the terms of probation

based upon the same facts as the original order granting probation is in excess of the jurisdiction of the court, for the reason that there is no factual basis to support it.'

[Citation.]" (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095, italics omitted.)

Accordingly, the trial court erred by attempting to modify the judgment.

DISPOSITION

The judgment as entered on May 3, 2010, is affirmed. The minute order entered May 18, 2010, attempting to modify the judgment is stricken.

NICHOLSON, Acting P. J.

We concur:

HULL, J.

DUARTE, J.