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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RENNARD CAWKWELL,

Defendant and Appellant.

D059077

(Super. Ct. No. SCD223009)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

Following a bench trial, Rennard Cawkwell was convicted of attempting to contact a minor with the intent to commit a sexual offense (Pen. Code,<sup>1</sup> §§ 664, 288.3, subd. (a)); attempting to commit a lewd act upon a child (§§ 664, 288, subd. (a)); and possession of child pornography (§ 311.11, subd. (a)). The trial court sentenced Cawkwell to prison for

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

four years eight months. Cawkwell appeals, challenging the sufficiency of the evidence to support his attempt convictions. We affirm the judgment.

## FACTUAL BACKGROUND

### *Prosecution Case*

Around August 2009, Cawkwell, 39 years old, began communicating with 11-year-old S.B. on an Internet chat site called Kidzworld.com. Cawkwell stated in his Kidzworld profile he was 13 years old and wanted to chat only with girls. S.B. believed everyone on Kidzworld was approximately her age. Cawkwell and S.B. chatted online about general matters a couple times a day for about a month. He told S.B. during their online chats that he cared for her and wanted to meet her. Although Cawkwell never talked about kissing or anything of a sexual nature during that time, S.B. believed he was acting "like a boyfriend."

After initially hesitating, S.B. agreed to meet Cawkwell at a recreation center near her home. They agreed to wear certain clothing so that they could recognize each other, and Cawkwell would hand S.B. a note. As agreed, Cawkwell approached S.B. at the recreation center. His note stated something like, " 'Now that I met you, I hope it doesn't change anything.' " S.B. "freaked out" and ran into the bathroom. Cawkwell stayed nearby and talked with some of S.B.'s friends. When S.B. exited the bathroom, she went with a friend to the other side of the recreation center and started walking toward her house. S.B. and her friend saw Cawkwell following them and they started running. S.B.'s friend yelled and screamed at Cawkwell that S.B. did not want to talk to him. Cawkwell followed them and called S.B.'s name until an adult told Cawkwell to return to

the recreation center. Cawkwell stayed there until police arrived. Police questioned but did not arrest him. Cawkwell said he was there to meet a friend, and that he relates to teenagers around age 14.<sup>2</sup>

Police followed up by assuming S.B.'s online identity and continuing her conversations with Cawkwell. Cawkwell first reinitiated online contact saying, "[T]alk to me [S.B.], what is your problem[? Why] don't you talk to me any more[?]" When the detective posing as S.B. resumed the conversation, Cawkwell asked whether police had contacted S.B.'s parents.

During two extended chats, Cawkwell described what he wanted in a future relationship with S.B. Although Cawkwell said that "just friends is good," he also said it would be nice to be boyfriend and girlfriend. "[I] dont [*sic*] know where to go to meet girls[, and] that's why [I] go to kids world[.] [I] go to singles websites too[, and] [I] do try to meet 18 to 35 year old women. . . . [T]eens are not kids[;] teens are young adults." "[I]n person gf means a girlfriend that you are with every day[. You] can hold and kiss her . . . you would be my in person girlfriend. . . . [W]e can be together in person and hold each other." Cawkwell said he was "just a big kid," but he also told S.B. that an older man would treat her better than someone her age. "[I] don't treat you like a kid[. You're] a young woman [and] [I] would treat you like a woman." When S.B. said she liked being his girlfriend, Cawkwell did not correct her but instead asked, "[Do] you

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<sup>2</sup> The court found Cawkwell not guilty of a charge under section 288.3, subdivision (a) that he contacted a minor with intent to commit a sexual offense based on this incident.

really like m[e] or do you just want me to buy you stuff[?]" S.B. asked about sex and Cawkwell told her that it wouldn't hurt much and that he would be gentle. Finally, Cawkwell asked S.B. if she would ever like to marry him, and told her she could marry "at any age."

At one point when asked to clarify something he had said, Cawkwell wrote, "[I] dint [*sic*] mean anything sexual." However, over the course of two extended chats, Cawkwell mentioned "kissing" eight times; "hugging" ten times; and "sex" four times. They discussed being girlfriend and boyfriend eight times; the need for privacy four times; and marriage twice.

Cawkwell stated that he wanted to see S.B. again: "[W]e can meet and when [we're] both sure that [we're] comfortable together then we can do more . . . ." He suggested they meet during daylight hours at a grocery store. S.B. agreed to meet. While planning their meeting, Cawkwell expressed his concern about S.B. "freaking out" again. Cawkwell made statements such as: "[T]here wont [*sic*] be anything sexual going on" and "we can walk around the store and talk." He wanted to keep their meeting secret, and suggested S.B. call her mother just before the time they were to meet so that her mother would not worry. He said "you[re] not gonna say anything to any one [*sic*] about meeting tomorrow right" and "that would be crazy to say anything." Cawkwell was also concerned that police not show up again. When asked if he was going to bring "protection," Cawkwell responded, "[We're] not [going to] do anything like that." But he immediately added, "[W]e have to know each other better . . . just kissing[,] holding hands."

Cawkwell drove nearly an hour to meet the person he thought was S.B. Police arrested him when he arrived at the designated time and place. Investigators searched Cawkwell's home computer and found over 300 images of child pornography.

### *Defense Case*

The defense called only one witness, Clark Clipson, Ph.D., a forensic psychologist who interviewed Cawkwell and Cawkwell's mother, and conducted neuropsychological tests on him. Dr. Clipson testified he did not believe Cawkwell has "any kind of paraphilia or other kind of deviant sexual interest that would lead him to commit a sexual offense." The psychological tests showed that Cawkwell's motor functioning is intact and Cawkwell displayed no significant psychopathology. But the tests also showed Cawkwell has numerous difficulties in perceptive and cognitive functioning, and overall difficulty focusing. Cawkwell's academic record reflected low academic functioning as well. Cawkwell's interpersonal social and adaptive skills are impaired. Due to the results of the tests and a personal history that included head trauma and problems at birth, Dr. Clipson claimed Cawkwell is "mildly mentally retarded" and possibly suffers from either Asperger's disorder or dementia. Dr. Clipson concluded Cawkwell was very unlikely to commit a sexual offense in the future. Instead, Dr. Clipson opined, Cawkwell's interests in a friendship with S.B. appeared to be more on the level of a six-or seven-year-old boy's understanding of friendship.

On cross-examination, Dr. Clipson conceded that whether someone is mentally or developmentally impaired is irrelevant when determining if that person is sexually deviant. Dr. Clipson said he would change his opinion regarding Cawkwell's behavior if

he had known that police found over 300 images of child pornography on Cawkwell's personal computer. He admitted Cawkwell's online behaviors could be considered grooming. The court asked Dr. Clipson, "So if Mr. Cawkwell had been, let's just assume hypothetically, had been successful at the [recreation] center in walking off with [S.B.] around the corner off somewhere where there weren't other people and actually making out with her, which is what apparently he might have had in mind, would that have been a sexual offense?" Dr. Clipson replied, "I believe it would have been in that context. You've got a guy that's much older than her, yes."

After considering the chat transcripts and trial testimony, the trial court concluded that "[Cawkwell was] exhibiting much more sophisticated behavior than . . . Dr. Clipson believes he [was] capable of." The court noted that since Cawkwell was adamant about keeping the entire relationship with S.B. secret, Cawkwell knew his conduct was wrong. The court inferred from the chats that Cawkwell engaged in clear sophisticated grooming behavior when he told S.B. that he would be gentle with her and not hurt her. He was not acting like an innocent six-year-old boy, but had adult, sexual intentions. The court convicted Cawkwell, finding: "It was [Cawkwell's] intent, I believe beyond a reasonable doubt, if [S.B.] had shown up at the [grocery store], to touch her in a sexual manner if she had let him."

## DISCUSSION

Cawkwell contends there was insufficient evidence he had the requisite intent to commit lewd acts with S.B. when he met her at the grocery store. Specifically, he argues his nonsexual intention was shown by his statements in the chats such as, "just friends is

good" and "we could meet at [the grocery store] . . . go shopping . . . pretend like [we're] shopping and talk to each other."

Cawkwell also contends that all of his actions pertaining to his meeting with S.B. show he did not attempt to commit the charged crimes. Cawkwell argues that since no evidence was found in his car and he did not send S.B. any pornographic material over the Internet, there was no evidence he had planned to commit lewd acts with S.B. when he met her at the grocery store.

### *Standard of Review*

In reviewing the sufficiency of the evidence on appeal, "[w]e examine the record to determine "whether it shows 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. Crabtree* (2009) 169 Cal.App.4th 1293, 1321-1322 ( *Crabtree* ).) Further, we presume " ' "the existence of every fact the trier could reasonably deduce from the evidence." ' ' ( *Ibid.* ) This standard applies whether direct or circumstantial evidence is involved. Although it is the fact finder's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt the other innocence, it is the trial court, not the appellate court, that must be convinced of the defendant's guilt beyond a reasonable doubt. " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' ' ( *Ibid.* ) In evaluating the sufficiency of the evidence, we are mindful that "it is the exclusive province of the trial judge or jury to

determine the credibility of a witness and the truth or falsity of the facts on which that determination depends." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

#### *Law Regarding Lewd/Sexual Acts upon a Minor*

A lewd act upon a child is "any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [the defendant] or the child." (§ 288, subd. (a).) The action may be " 'any touching' of an underage child . . . with the intent to sexually arouse either the defendant or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 442.) The crime may be based on conduct having " 'the outward appearance of innocence.' " (*Id.* at p. 444.) The controlling factor is the defendant's intent when touching the minor, not the type of touching.

Additionally, "[e]very person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 288 . . . involving the minor" has violated section 288.3, subdivision (a). (§ 288.3, subd. (a).)

#### *Law Regarding Attempt*

An attempt to commit a crime consists of two elements, a specific intent to commit the crime and a direct but ineffectual act done toward its commission. (*People v. Gallardo* (1953) 41 Cal.2d 57, 66, overruled on other grounds by *People v. Chapman* (1959) 52 Cal.2d 95, 98.) Although merely intending or planning to commit a crime does not constitute an attempt, slight direct actions can be sufficient. " 'The preparation consists in devising or arranging the means or measures necessary for the commission of

the offense; the attempt is the direct movement toward the commission after the preparations are made.' " (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.) For an attempt, the overt act must show that the defendant is putting his plan into action, but it need not be the last proximate or ultimate step toward commission of the crime or crimes (*People v. Kipp* (1998) 18 Cal.4th 349, 376) nor need it satisfy any element of the crime. (*People v. Dillon* (1983) 34 Cal.3d 441, 454 (*Dillon*)). It is sufficient if it is the first or some subsequent act directed toward that end after the preparations are made. (*People v. Memro* (1985) 38 Cal.3d 658, 698 (*Memro*), overruled on other grounds as stated in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

No clear marker divides preparatory acts from those initiating the criminal act. Nonetheless, " 'the more clearly the intent to commit the offense is shown . . . "the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement" ' of an attempt." (*Crabtree, supra*, 169 Cal.App.4th at p. 1322, quoting *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187-188.) In other words, whenever the intent to commit a crime is clearly shown, slight acts in furtherance of that crime will constitute an attempt. (*Memro, supra*, 38 Cal.3d at p. 698.)

" ' "Applying criminal culpability to acts directly moving toward commission of crime . . . is an obvious safeguard to society because it makes it *unnecessary for police to wait before intervening until the actor has done the substantive evil* sought to be prevented. It allows such criminal conduct to be stopped or intercepted *when it becomes clear what the actor's intention is and when the acts done show that the perpetrator is*

*actually putting his plan into action.* " ' ' " (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1389.)

*Sufficient Evidence Supports Cawkwell's Convictions*

The evidence shows that Cawkwell set up a fake profile on a website aimed at children and chatted with 11-year-old S.B. He told her he wanted to be her boyfriend as well as her friend. His definition of a boyfriend/girlfriend relationship included hugging, kissing, holding each other, and "making out." He initiated a meeting with S.B. that failed when S.B. became scared and ran away. At that time, police questioned Cawkwell. This intervention put Cawkwell on notice that his attempt to befriend S.B. was at least inappropriate. Nonetheless, his inadequate response to S.B.'s running from him and police involvement was to tell S.B. he didn't want those events repeated. He was undeterred, reinitiated online contact with someone he believed was S.B., repeatedly brought up kissing and other lewd acts, and planned a second meeting. Although he also wrote they were not going to do anything sexual the first time they met, it is reasonable to infer from Cawkwell's chat comments, as the trial court did, that his seemingly innocent statements were not that of a seven-year-old child, but rather served as a sophisticated grooming tactic to entice S.B. to meet with him. We conclude Cawkwell's intention was to befriend S.B. and commit lewd acts on her.

Further, Cawkwell's actions were more than preparatory. The court noted that Cawkwell's intention at the first meeting may have been merely to meet S.B. and determine what her reaction to him was. But the second meeting was much different because Cawkwell risked another police encounter by continuing to pursue S.B. online.

The sexual content of the subsequent online discussions made Cawkwell's intentions clear; therefore, only a slight step was required to satisfy the overt act requirement of an attempt. (*Memro, supra*, 38 Cal.3d at p. 698.) Thus, as the trial court rightly concluded, Cawkwell's arrival at the grocery store to meet S.B. was that slight step and sufficed to support the convictions for attempt to contact a minor to commit a sexual offense and lewd act, and attempt to commit a lewd act.

Cawkwell attempts to distinguish his case from *Crabtree, supra*, 169 Cal.App.4th 1293 and *Memro, supra*, 38 Cal.3d 658, two cases that affirmed convictions for attempted lewd acts on minors. In *Crabtree*, police arrested the defendant who attempted to meet the child in a public place—a bus station—after having sexually explicit online conversations with her. Police had found sexual paraphernalia in the defendant's car. (*Crabtree, supra*, 169 Cal.App.4th at p. 1323.) The defendant appealed, contending he had not planned to have sex with the child at the bus station where he was arrested; therefore his arrival there constituted mere preparations. The court disagreed: "We find unpersuasive appellant's position there was no attempt, because 'the events at the bus station were still in the preparation stage.'" (*Crabtree, supra*, 169 Cal.App.4th at p. 1323.)

Cawkwell contends *Crabtree* is inapposite because in this case he told S.B. nothing sexual would happen during their meeting, and he brought nothing with him to the meeting. We disagree. His failure to bring items to the meeting is not dispositive, nor are his isolated statements taken out of context. In *Crabtree*, the seemingly innocent act of showing up at the bus station to meet the intended victim, though not itself a lewd

act, was an overt act in furtherance of the defendant's intended crime. So too here, Cawkwell's attempt to meet S.B. at the grocery store was an overt act in furtherance of his plan to become S.B.'s boyfriend and commit lewd acts on her. The key point is that in both *Crabtree* and this case the defendants' actions were direct but ineffectual steps toward the completion of their plans.

In *Memro*, the defendant lured a youth upstairs to his bedroom, but the youth refused to comply with the defendant's plans to engage in sex. The defendant was found guilty of attempted lewd conduct. On appeal, the court stated: "No specific 'plan' vis-a-vis [the minor] had been formulated. Nevertheless, the 'arrangement' of lights, pornographic materials and other paraphernalia in appellant's apartment would suggest sufficient planning to enable appellant to commit lewd conduct once a willing participant came along." (*Memro, supra*, 38 Cal.3d at p. 699.)

Here, Cawkwell contends *Memro* does not apply because he did not meet S.B. in a private place. We again disagree. An overt act beyond mere preparation may occur in public or private, and may appear outwardly as "innocent behavior." (*Dillon, supra*, 34 Cal.3d at p. 455.) Cawkwell's stated purpose for meeting with S.B. was to develop a boyfriend-girlfriend relationship that includes holding hands, kissing, and cuddling. Therefore the meeting at the grocery store constituted "an immediate step in the present execution of the criminal design," which is an attempted crime. (*People v. Jones* (1999) 75 Cal.App.4th 616, 627.) We note that Cawkwell's request to meet S.B. in a public place does not mean he intended to keep her there. We conclude that the apparently innocent meeting between Cawkwell and S.B. in the grocery store was a direct but

ineffectual attempt to carry out his plan to commit a sexual offense and lewd acts on a child.

DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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McCONNELL, P. J.

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IRION, J.