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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN WILLIAM BIRDSONG, Defendant and Appellant.	F068809 (Super. Ct. No. 1452321) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. John D. Freeland, Judge.

Candace Hale, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J. and Franson, J.

INTRODUCTION

A jury convicted appellant John William Birdsong of attempting to send harmful matter to seduce a minor (Pen. Code, §§ 664/288.2, subd. (a))[1] and contacting a minor with intent to commit a lewd act upon a child (§ 288.3, subd. (a)). Appellant thereafter admitted his prior prison term (§ 667.5, subd. (b)). At sentencing, he was denied probation and sentenced to a total of five years four months in state prison. Appellant timely filed a notice of appeal.

On appeal, appellant seeks reversal of the section 664/288.2 conviction because the prosecutor allegedly misstated the law in her rebuttal argument. We find merit to the allegation that the prosecutor misstated the law, but affirm the judgment.

BACKGROUND

Evidence

In July 2012, appellant was 62 years of age. The victim, Jane Doe, was 11 years of age. Jane's parents were Rhonda C. and Denise H. One day, Jane's cell phone rang and Rhonda answered. A man's voice asked, "Is this [Jane Doe]?" (using one of their daughter's nicknames). Rhonda responded, "Yes, it is," and the man then asked, "How are you, sweetheart?" He went on to say, "I have two beds now. Would you like to come out and stay with me?" Rhonda responded, "I don't think my mom would like that." He said, "You could sleep in one and I could sleep in the other, or you could sleep in my bed with me." Rhonda said, "I don't think my mom would like that." He said, "Well, can you try to work it out? Can you tell your mom you're going to go someplace else and then you could meet me at Wal-Mart?" Rhonda said, "Maybe." Rhonda received another text and call from the same number within the next half hour. The male voice asked how long her hair was and how she liked to dress and kiss. She said she didn't

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1 All further statutory references are to the Penal Code unless otherwise noted.

know. Rhonda said she was 11 or perhaps 12 years old. The man said he was 18 years old.

Rhonda said she was going to her cousin's house, and the man asked if he could call her there. She said yes. Rhonda then called the police. Officer Darren Ruskamp used a forensic extraction device to generate a text message report. He texted the same number, saying "I now have my cousin's phone and I can send you a picture." In a return message, Ruskamp asked appellant to send a picture and shortly thereafter he received a photograph of an adult male.

Ruskamp texted that she was 13 years old and new to this; he received texts until 7:00 p.m. that night and the next morning. These texts included, "I will take my time with u"; "Babe, want to know how big I am?"; and "I have 10 inches for u." The texter suggested a 6:00 meeting, then cancelled it. Ruskamp asked if he would use protection, and he responded "Got to stop and buy a condom." Ruskamp asked for a 7:00 p.m. meeting, but the texter cancelled that too. The texter suggested they meet the next day, but did not set a time. After several more texts, the texts and calls stopped. Appellant was subsequently taken into custody after police traced the cell phone. Rhonda heard appellant speak during the preliminary hearing and testified his voice was the same as the one that she heard on the phone.

The Charges and Relevant Penal Statutes

Appellant was charged with two crimes, an attempt to send harmful matter to seduce a minor (§ 664/288.2, subd. (a)) and contacting a minor with the intent to commit a lewd act upon a child (§ 288.3, subd. (a)). The information also alleged a prison prior conviction (§ 667.5, subd. (b)).

At the time of appellant's trial, section 288.2, subdivision (a) provided in relevant part:

> "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor,

> knowingly … exhibits … 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, is guilty of a public offense ….”
>
> Section 313, subdivision (a) 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.”

Contentions on Appeal

Appellant’s contends that the conviction on the first count (§ 664/288.2, subd. (a)) should be reversed because, in her rebuttal argument, the prosecutor misstated the law as to that count. In her rebuttal argument to the jury, the prosecutor stated:

> “So my argument in regard to ‘to a minor’ means that when you’re looking at the material as a whole, you’re not deciding whether, well, if an adult got this, maybe they wouldn’t be obviously offended, but you’re looking at the material as a whole, you’re looking at the fact that it’s being text messaged to a 13-year-old girl.”

The defense objected and the court then addressed the jury as follows:

> “Ladies and gentlemen, remember my instruction. If one or both attorneys misstate the law or they say something different than what I read to you or what is in these instructions, follow these written instructions that I give you. All right. [¶] Thank you.”

Appellant contends that the prosecutor’s statement that “‘you’re looking at the material as a whole, you’re looking at the fact that it’s being text messaged to a 13-year-old girl’” misstates the law because it asks the jury to judge the harmfulness of the material based on the fact it was sent to a minor rather than applying an adult standard. Respondent argues that when the prosecutor argued that “‘you’re looking at the fact that it’s being text messaged to a 13-year-old girl,’ she was referring to the text message[s] being considered as having a ‘serious literary, artistic, political, or scientific value for minors.’”

Standard of Review

The parties disagree about the appropriate standard of review for this court reviewing a claim of prosecutorial misconduct. Appellant contends that the standard calls for independent review, while respondent contends that we should use the "'reasonable likelihood'" standard. Respondent is correct. In evaluating whether comments made by a prosecutor before the jury violate the Fourteenth Amendment to the federal Constitution, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained of remarks in an objectionable fashion. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) We apply that standard here.

DISCUSSION

Appellant's claim that the prosecutor misstated the law in her rebuttal argument is correct. The definition of harmful material contained in section 313 does not define the harmful material from the point of view of a minor. A statewide, average adult person's standard is the measure. It used to be otherwise until the statute was amended in 1988. Prior to the statute's amendment, the statute contained language describing harmful matter as "'patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors ….'" (*People v. Dyke* (2009) 172 Cal.App.4th 1377, 1382, italics omitted.) This language was deleted as part of the 1988 amendment. (*Ibid*.) While the prosecutor's argument would have been permissible under the pre-1988 language of the statute, it was a misstatement of law in 2012 to tell the jury that in deciding whether this was harmful material they needed to consider the fact that it was being text messaged to a 13-year-old girl.

Respondent's argument that when the prosecutor argued that "'you're looking at the fact that it's being text messaged to a 13-year-old girl,' she was referring to the text message[s] being considered as having a 'serious literary, artistic, political, or scientific value for minors'" is unconvincing. It is true that one aspect of the statutory definition of harmful matter is that a reasonable person would conclude that it "lacks serious literary,

artistic, political, or scientific value for minors." (§ 313, subd. (a).) But when the prosecutor made her comments, she was not talking about whether the material had any value for a minor. Instead, she was discussing whether the material was obviously offensive and suggested that in answering that question, the jury could consider whether the text messages would have been offensive to a 13-year-old girl. This misstated the definition of harmful material described in section 313.

A prosecutor commits misconduct by misstating the law. (*People v. Boyette* (2002) 29 Cal.4th 381, 435.) The question before us is whether there is a reasonable likelihood that the jury construed or applied any of the misleading remarks in an objectionable fashion. (*People v. Morales*, *supra*, 25 Cal.4th at p. 44.) We conclude, for the reasons stated below, that there is no reasonable likelihood that the jury utilized an erroneous definition of harmful matter.

First, defense counsel immediately and properly objected to the misstatement at the time it was made. The court advised the jury that if one or both attorneys misstated the law or said something than what the court had instructed, that they were to follow the written instructions given by the court. Thereafter, the prosecutor did not repeat the objectionable remarks.

Second, defense counsel made a point of stating more than once during his closing argument that the standard for judging whether material was harmful matter did not include an inquiry as to whether the material was offensive to a minor. Defense counsel argued:

> "Harmful material, how do you define it? Well, first, the first part of it, it has to depict or describe a sexual act, that's first.
>
> "And not only does it have to do that, it has to do it in an obviously offensive way. Obviously offensive to whom? Not to a minor, that's not what the law says."

Later, defense counsel argued:

> "Now, if you're thinking if a minor heard it, that would offend me. That's not the standard. The standard is, first, is it obviously offensive? And then if it is, was it sent to a minor? Not it's offensive because a minor received it. And that is an area that you must, must follow because that's the state of the law…."

And finally:

> "Do you understand—and I hope that you do. I hope I've explained things the way that are understandable—that the harmful material is harmful to you as hearing it as an average adult. If it's harmful as an adult, was it disseminated to a minor?"

Defense counsel repeatedly emphasized that whether material is harmful depends on whether the average *adult* person would conclude that it appeals to prurient interests.

Third, the court's instructions to the jury correctly stated the law. Appellant does not contend otherwise. The trial court instructed the jury on the definition of section 288.2, subdivision (a) by reading CALCRIM No. 1140, stating as follows:

> "To prove that [appellant] is guilty of this crime, the People must prove that: Number 1, [appellant] attempted to send harmful material to a minor; number 2, when [appellant] acted, he knew the character of the material; number 3, when [appellant] acted, he knew the other person was a minor; number 4, when [appellant] acted, he intended to sexually arouse, appeal to, or gratify the lusts, passions, or sexual desire[s] of himself or of the minor; and number 5, when [appellant] acted, he intended to seduce the minor.
>
> "You must decide whether the material at issue in this case meets the definition of harmful material. For the crime alleged in Count I, material is *harmful* if, when considered as a whole: Number 1, it shows or describes sexual conduct in an obviously offensive way; number 2, a reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value for minors; and number 3, the average adult person, applying contemporary statewide standards, would conclude it appeals to prurient interests." (Italics added.)

These instructions tracked the relevant statutes (§§ 288.2 & 313) and were consistent with defense counsel's repeated argument to the jury that the test for deciding whether material was harmful was whether it was offensive to an adult not a minor.

Except for the brief remark made by the prosecutor in her rebuttal argument, to which the defense immediately objected and the court thereafter admonished the jury to follow the court's instructions on the law, all other communications to the jury regarding this issue stated the law correctly. The jury is presumed to have followed the court's instructions. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) Under the circumstances, we conclude that there is no reasonable likelihood that the jury misconstrued the law or applied an incorrect aspect of the law in coming to its verdict.[2]

DISPOSITION

The judgment is affirmed.

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[2] Respondent contends that there was no prejudice because the evidence of guilt was overwhelming. Appellant responds that there was no overwhelming evidence that the texts were obviously offensive by adult standards. We need not weigh into this debate, because for the reasons stated we find there is no reasonable likelihood that the jury was led astray by the prosecutor's single misstatement in her closing argument.