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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK AIME BROSSEAU,

Defendant and Appellant.

G050297

(Super. Ct. No. 10WF2381)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer and James Edward Rogan, Judges. Affirmed as modified.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christopher Beesley and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Mark Aime Brosseau of lewd acts on a child 14 years of age (Pen. Code, § 288, subd. (c)(1) [count 1]; all citations are to the Penal Code unless noted otherwise), contacting or communicating with a minor with intent to commit a lewd act (§ 288.3, subd. (a) [count 2]), and arranging and meeting a minor to engage in lewd behavior (§ 288.4, subd. (b) [count 3]). Brosseau contends the trial court erroneously imposed multiple punishment in violation of section 654 by imposing a concurrent term for contacting a child with intent to commit a lewd act (count 2) in addition to a term for arranging and meeting a minor with intent to engage in lewd behavior (count 3). For the reasons expressed below, we affirm as modified.

I

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 9:50 p.m. on the evening of September 25, 2010, Huntington Beach Police Officer Daniel Kim and his partner, Officer Richard Gonzales, received a dispatch concerning a person seated or standing on the ledge of a six-level parking structure at the Bella Terra shopping center. While driving through the lot, the officers noticed a black pickup truck parked away from other vehicles on the top level. The truck caught the officers' attention because of condensation on the inside of the windows.

Kim used his flashlight to peer inside the truck. The driver, 54-year-old Brosseau, sat in the center of the bench seat with the top portion of his buttocks and upper thigh exposed. Brosseau, sweating and flushed, appeared "aggravated, flustered, upset [and] very skittish." Brosseau attempted to pull up his pants or reach for something in his waistband. Kim told him to keep his hands on the steering wheel.

The passenger, 14-year-old Christian A., also made a movement toward his waistband. Christian's pants were halfway down his thighs, and he appeared to be grabbing his penis and trying to cover his genital area.

A crime scene investigator arrived and obtained DNA swabs from Brosseau. Brosseau remarked to an officer during the swabbing Christian's skin cells would be on his hands and lips. During Brosseau's swabbing, Christian put his shirt in his mouth and rubbed the inside of his cheeks, his tongue and the outside of his mouth.

DNA from a hickey or "suction injur[y]" on the left side of Christian's neck contained Brosseau's DNA. DNA on Christian's penis came from Christian, a major female contributor, and a minor male contributor. Brosseau's DNA matched that of the minor contributor at eight of 15 loci for a frequency estimate of one in one million.

Investigators found unopened condoms and personal lubricant in the driver side door pocket of the truck. After his arrest, Brosseau said Christian's parents did not understand the boy, and this was what he got "for caring" about Christian.

About two weeks before the Bella Terra incident Christian's mother called the police and reported Christian had been missing for three days. Christian left a note stating he disliked his parents' rules, and suggested he might harm himself. Phone records reflected Christian had made thousands of calls and texts to Brosseau's number. Mother called the number and the person answering identified himself as "Mark," and stated he was Anthony's grandfather. Christian had mentioned or introduced a friend named Anthony, who he said he met through BMX bike riding. A police officer also phoned Brosseau, who identified himself as Mark M. (Anthony's last name). Brosseau denied knowing Christian's whereabouts, but thought Anthony had been in contact with him and he might be at Anthony's football practice. Brosseau said Christian had been to his residence two or three times.

The officer went to the high school but learned there was no football practice that day. He phoned Brosseau again, who reported Christian had just arrived at his Stanton residence. Brosseau called Christian's mother, and told her Christian was upset and needed to cool down. The officer spoke with Christian, who said he was okay and did not want to harm himself. Christian became emotional and described Brosseau

as a father figure. At some point during the conversation, the officer advised Brosseau that Christian was 14 years old.

Christian testified he posted a personal ad on Craigslist in June 2010 in the “men looking for men” section because he sought a “father figure” over 50. Because Brosseau’s reply did not contain sexual references Christian believed he seemed “safe” and less “sketchy.” The pair communicated by phone, text message, and e-mail for several weeks. Christian disclosed his age to Brosseau. The pair first met at a middle school near Christian’s home. They drove around, had lunch, and Brosseau tried to kiss him, but Christian said no. They continued to communicate and the level of physical contact escalated. On one occasion, they went to a movie and held each other’s penises.

Christian began spending nights at Brosseau’s home, and they engaged in masturbation, oral sex, and sexual intercourse. This activity occurred about once every four nights he spent with Brosseau and continued until the night Brosseau was arrested. They engaged in sexual activity in Brosseau’s bedroom and in his truck. Christian told his parents he had a friend named Anthony who he met through biking, and Brosseau was Anthony’s father. He also told his parents he would stay at the home of another friend named Mark.

Christian ran away on the Friday before Labor Day and went to Brosseau’s. He removed the SIM card from his phone so he could not be tracked. Christian was present when his mother phoned Brosseau. His parents came over to retrieve him, but they agreed to let him stay for a short period.

When Christian returned to school after Labor Day, he falsely reported to school officials his father had sexually molested him on three occasions. Christian believed he would be allowed to live with Brosseau, but he recanted after speaking with social workers and the police.

Although Christian’s parents told him they did not want him communicating with Brosseau, Christian and Brosseau continued to call and text each

other until the night of the Bella Terra incident. That night, Christian's family planned to have dinner at Bella Terra. Christian texted Brosseau and threatened to kill himself unless Brosseau helped him. They arranged to meet in the parking structure.

Christian stood on the ledge of the parking structure, and when Brosseau arrived Christian told him he was unhappy with his current life situation. They talked, kissed, touched each other's genitalia, and Brosseau performed oral sex on Christian. Brosseau gave Christian the hickey.

At the hospital, Christian went to the bathroom and tried to wipe off the saliva. Christian told a police officer and a nurse he and Brosseau exchanged hugs and a kiss, but insisted there was no sexual contact. Christian's parents sent him to a residential youth treatment facility. About 14 months later, Christian wrote a letter at the suggestion of a school therapist and for the first time acknowledged Brosseau's sexual abuse.

Brosseau's phone contained several text messages to Christian with sexual connotations. On the day of the Bella Terra incident, Brosseau and Christian exchanged messages concerning specifics about meeting at the shopping center. Brosseau's computer contained "very little activity" because the operating system had been re-installed shortly after Brosseau's arrest, overwriting data previously stored on the computer. Brosseau had phoned his home from the jail a few hours before the re-installation of the operating system.

Defense

Brosseau testified and denied any sexual activity with Christian. He replied to Christian's Craigslist "casual encounters" ad out of concern because the ad, while ostensibly seeking a nonsexual male mentor, used the term FWB or "friends with benefits." Brosseau was not looking for a sexual relationship. He and Christian had several communications before they met in person. Christian did not tell Brosseau his age, and Brosseau believed Christian was 18 or 19 based on his appearance. They got together to talk, take walks, and they went out to eat and to the movies. Brosseau was

shocked to learn Christian was 14 when the officer and Christian's mother called over Labor Day weekend.

Brosseau asserted his text messages to Christian did not connote a "sexual love." He agreed to meet Christian at Bella Terra because Christian texted him he was on top of the parking structure, and he feared Christian might harm himself. Brosseau did not deny texting Christian on the morning of the incident stating something like, "We need each other to love and keep safe. We're both better people together." He also sent several texts in the afternoon concerning the time and place of the assignation, and stating, "I just want to see you" and asked "how much time are we going to have." In the truck, he gave Christian a hug. Christian said everyone hated him at school and he had no one else to talk to. Brosseau gave Christian another hug and a kiss on the side of the cheek. They were both crying. Brosseau denied Christian's or his pants were down when the police officers rushed the car.

Brosseau's daughter Jamie testified Christian spent time at the home with her family, and she saw no inappropriate activity. Jamie had never seen her father do anything lewd or inappropriate with children. She believed Christian was 18. She received a phone call from her father from jail after his arrest around 1:00 or 2:00 a.m. Jamie told a defense investigator Brosseau advised her the police were going to come to the house and "bust down the door." She spoke with another resident, Junior, and they decided to "wipe" Brosseau's computer because they were "concern[ed] about information the police might find regarding [Brosseau's] chatting with people," although Jamie was not "worried about anything with Christian." Jamie denied her father asked them to do anything with the computer. Other relatives provided similar testimony.

Following trial in October 2013, a jury convicted Brosseau as noted above. In May 2014, the trial court imposed a three-year prison sentence, comprised of a three-year midterm for meeting a minor to engage in lewd conduct (count 3) and a concurrent

one-year term for contacting a minor (count 2). The court stayed (§ 654) a term for committing a lewd act (count 1).

II

DISCUSSION

A. *Pitchess Motion*

Brosseau filed a pretrial discovery motion seeking the personnel records of Officers Gonzales and Kim. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code, § 1043 et seq.; §§ 832.5, 832.7, 832.8.) The defense asserted the officers had not been truthful in their reports and preliminary hearing testimony, and sought information relating to the officers' lack of credibility and prior acts of moral turpitude. After examining the personnel records in camera, the trial court denied Brosseau's discovery motion.

Brosseau asks us to independently review the record of the in camera *Pitchess* proceeding and the documents submitted to the court to determine whether the court complied with the requisite procedures described in *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*).

We have reviewed the sealed reporter's transcript of the *Pitchess* hearing conducted by Judge David Hoffer on October 12, 2012. The trial court placed under oath the Huntington Beach Police Department's custodian of records, Officer James Schoales. Schoales declared he had made a thorough search for records involving the officers and gave the court all the records conceivably falling within the parameters of the request. The court examined the officers' files with Schoales on the record, in the presence of the city attorney, and identified the documents it reviewed. For each officer, the court described for the record the nature of any citizen complaints and documentation of the investigation into those complaints. The court concluded there were no allegations of false statements or dishonesty. The court also reviewed the Department's "negative comment logs," which are not formal investigations but "where an employee has done

something” needing correction. The court stated there was nothing involving false statements or false reports. The trial court described on the record the files it examined before ruling on the *Pitchess* motion. Based on the court’s representations there was nothing discoverable we discern no need to review the personnel files the court described and examined in camera. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209 [trial court’s description of the records it reviewed “is adequate for purposes of conducting a meaningful appellate review”].) The court did not abuse its discretion by denying Brosseau’s *Pitchess* motion.

B. *Section 654*

The information charged three offenses occurring on or about September 25, 2010. Count 1 alleged a violation of section 288, subdivision (c), which provides in relevant part: “Any person who commits an act described in subdivision (a) with the intent described in that subdivision [a willful lewd or lascivious act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child], and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year.”

Count 2 charged a violation of section 288.3, which provides in relevant part: “Every person who contacts or communicates with a minor, or attempts to contact or communicate [as defined] 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 shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.”

Count 3 charged a violation of section 288.4, which provides in relevant part: “Every person who, motivated by an unnatural or abnormal sexual interest in children, arranges a meeting with a minor or a person he or she believes to be a minor for

the purpose of exposing his or her genitals or pubic or rectal area, having the child expose his or her genitals or pubic or rectal area, or engaging in lewd or lascivious behavior, shall be punished by a fine not exceeding five thousand dollars (\$5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment. . . . [¶] (b) Every person described in paragraph (1) of subdivision (a) who goes to the arranged meeting place at or about the arranged time, shall be punished by imprisonment in the state prison for two, three, or four years.”

Brosseau contends the court erred by failing to stay (§ 654) the concurrent term imposed for contacting a minor (count 2). Brosseau asserts all the offenses were “dependent on one another and were committed with the common objective of committing a lewd act on a minor.” He explains, “Appellant arranged to meet Christian at the parking structure with the intent to engage in lewd conduct (count 3) by contacting him with the intent to violate section 288 (count 2) and the jury necessarily found that appellant had the requisite intent. [¶] No evidence shows appellant harbored multiple objectives in committing the offenses. The evidence does not show count 2 was committed with a separate objective from the offenses of meeting Christian to engage in lewd conduct and engaging in lewd conduct. And even if one could articulate multiple objectives behind the offenses, no evidence shows the objectives in committing the offenses were independent of each other.” Brosseau notes the trial court stated it was imposing a concurrent term rather than a consecutive term because “the crimes and their [objectives] were predominantly dependent [on] each other.”

Section 654 provides, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” By its express terms, section 654 applies where a single act violates more than one statute. (*Neal v. State of California* (1960) 55 Cal.2d 11, 20 (*Neal*).

Section 654 also bars multiple punishments where a course of conduct violating more than one statute constitutes an indivisible transaction. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) Whether a course of conduct is a divisible transaction depends on the intent and objective of the actor. (See *People v. McFarland* (1962) 58 Cal.2d 748, 762 [defendant who enters a building with the intent to commit theft and thereafter steals property can be punished only for the greater of the two offenses committed because defendant's single objective was to steal property]; *People v. Latimer* (1993) 5 Cal.4th 1203, 1215 (*Latimer*) [judicially created "'indivisible course of conduct'" rule allows separate punishment only if the defendant acted with a separate criminal objective or intent with respect to each "act or omission"].) Where all the acts and offenses are "merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *Neal, supra*, 55 Cal.2d at p. 19.) The purpose of section 654 is to ensure that a defendant's punishment is commensurate with culpability and that punishment is not imposed more than once for what is essentially one criminal act. (See *Latimer, supra*, 5 Cal.4th at p. 1211.) We uphold the trial court's express or implied findings under section 654 if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Even though imposition of a concurrent sentence makes no practical difference in a case, the trial court must stay a concurrent term if section 654 prohibits multiple punishment. (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

Here, Brosseau contacted Christian, arranged a meeting, and met Christian for the purpose of committing lewd acts on September 25, 2010. All of Brosseau's acts and offenses were incidental to, and were the means of accomplishing or facilitating one objective.

The Attorney General responds the court could separately punish Brosseau for contacting (count 2) and arranging a meeting (count 3) with Christian because the

offenses were separated in time and Brosseau had the “‘opportunity to reflect and to renew his or her intent before committing the next’” offense. The Attorney General notes Brosseau texted Christian some 30 minutes before the meeting and Brosseau “‘had the opportunity to think about what he was doing and to renew his intent before committing his next crime of actually meeting with Christian.’”

No evidence shows the contacting and arranging were committed with separate objectives. While Brosseau was more culpable because he followed through on the arranged meeting, this fact elevated that offense from a misdemeanor to a felony. (§ 288.4, subdivision (a)(1) [misdemeanor of arranging a meeting with a minor for the purpose of engaging in lewd behavior]; § 288.4, subd. (b) [felony where defendant “‘goes to the arranged meeting place’” as arranged].) As noted by Brosseau, “‘that [he] arranged the meeting and then, after having time to reflect, ‘resumed and intensified his criminal behavior,’ is the exact reason he received a felony three-year prison term on count 3. Additional punishment for contacting the minor in count 2 should not have been separately punished.” We agree.

The Attorney General’s reliance on *People v. Trotter* (1992) 7 Cal.App.4th 363 is unavailing. There, the defendant stole a taxi and fired three shots at a pursuing police officer, the second shot followed the first shot by a minute, and several seconds separated the second and third shots. (*Id.* at p. 366.) The jury convicted the defendant of three assaults, one for each shot fired, and the court sentenced him separately for two of the offenses. (*Ibid.*) The defendant argued section 654 precluded separate sentences because the shots were part of a single course of conduct with the sole objective of avoiding apprehension. (*Ibid.*) The appellate court rejected the argument stating “[a]ll three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible,” and “defendant’s conduct became more egregious with each successive shot” because “[t]here was . . . time prior to each shot for defendant to reflect and consider his next action.” (*Id.* at p. 368.)

Trotter upheld separate punishment in part because the defendant’s conduct “became more egregious with each successive shot,” which posed a “separate and distinct” risk to the officer and other drivers. (*Trotter, supra*, 7 Cal.App.4th at pp. 367-368.) Here, as noted, Brosseau’s “more egregious” conduct was actually meeting Christian after contacting Christian and arranging the meeting, and he received enhanced punishment (felony versus misdemeanor) based on that fact. (*Id.* at p. 368.) *Trotter* therefore is distinguishable.

III

DISPOSITION

The judgment is modified (§ 1260) to stay punishment (§ 654) on count 2. The trial court is directed to prepare an amended abstract of judgment and to serve a copy on Brosseau and the California Department of Corrections and Rehabilitation. The judgment is affirmed in all other aspects.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.