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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.

ROBERT HOWARD CLAUDIO,

Defendant and Appellant.

G050466

(Super. Ct. No. 12CF0738)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Robert Booher, 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, Arlene A. Sevidal and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Robert Claudio of kidnapping for the purpose of committing a lewd act on a child under age 14 (Pen. Code, § 207, subd. (b) [§ 207(b)]; all

further statutory references are to this code) and four counts of committing a lewd act on a child under 14 (§ 288, subd. (a)). The jury found defendant engaged in substantial sexual contact with the victim (§ 1203.066, subd. (a)(8)), and found true the strike allegation that he kidnapped the victim (§§ 667.6, subds. (b) & (e)(1); 207, 209, 209.5). The court sentenced defendant to concurrent terms of 15 years to life on each of the lewd act counts, and stayed under section 654 the upper term of 11 years on the kidnapping count.

Defendant challenges the sufficiency of the evidence to support his conviction on the kidnapping count because he contends fraud or deceit is a necessary element of the offense. He asserts that element was lacking because his 13-year-old victim correctly guessed defendant's intent in luring him into a bathroom was sexual in nature, and therefore was not deceived. In a related argument, defendant argues the kidnapping instruction (CALCRIM No. 1200) was erroneous because it failed to specify fraud or deceit was a necessary element. Alternately, defendant argues the offense of kidnapping a child with a lewd intent by hiring, persuading, enticing, decoying, or seducing the child with false promises is unconstitutionally vague. As we explain, defendant's contentions are without merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In March 2012, defendant approached 13-year-old Angel in the Teen Room at the Tustin library while Angel waited for his mother to pick him up after school. Defendant seemed like he was looking for someone, and he engaged Angel in conversation, asking him where he went to school, what grade he was in, and how old he was. Angel responded to defendant's questions, telling him his age, his middle school, and that he was in seventh grade.

Defendant told Angel that he "helped kids like [you]," who were "like shy and scared." He told Angel he was in college, studying to be a social worker. He

suggested he and Angel should go outside to talk more, and Angel agreed to accompany him. Defendant showed interest in learning about Angel's family and friends, and asked how Angel's day had been at school. Angel told him it had been a "bad day" because he had been bullied and did not have many friends. Defendant offered to be his friend and "mentor."

Defendant turned the conversation to sexual matters. He asked Angel if he had a girlfriend, and how often he masturbated. He told Angel he was bisexual, and asked Angel about his sexual preference. Angel replied that he was "confused," noting in his testimony that he was "barely entering [his] teens" and "I guess . . . I didn't know what I wanted." He admitted the same to defendant, explaining, "Hey, I'm going through puberty; so I really don't know what I want." Defendant said he could help Angel. He asked if Angel ever experimented and offered to "be there" for Angel "if [he] wanted to talk." Angel first thought defendant meant that he wanted to be friends. Angel had never "had a friend older than me." Angel came to believe defendant wanted to have sex.

After they talked more about Angel's family and the one person who was kind to him, a female friend, defendant instructed Angel to go into the "Family" bathroom. Angel went into the bathroom and stood by the sink. After a minute passed, defendant entered, told Angel he needed to use the bathroom, and locked Angel in the room. Angel asked if he could leave, and defendant said, "No."

Angel faced the door while defendant used the toilet, and when defendant finished, he instructed Angel to take his clothes off. Defendant grabbed Angel's hand, placed it on defendant's bare penis, and directed Angel to move his hand back and forth on his penis, which became erect. Defendant in turn placed his hand on Angel's penis and they engaged in mutual masturbation. Defendant directed Angel to lay on the floor, and he complied. Defendant got on top of Angel and put his penis in Angel's anus. It was uncomfortable and painful. Defendant moved his body in a thrusting motion about five times, then Angel told him to stop.

Angel moved into a corner of the room, told defendant to “Please stop.” Defendant told Angel to “relax” and would not let him leave the room. He placed his mouth on Angel’s penis and orally copulated him. Angel thought the whole incident lasted about 15 minutes. Defendant put his clothes back on and left the bathroom.

Angel cried, put his clothes on, and when he left, defendant was waiting for him by the exit, where he told Angel, “Come walk with me.” He ordered Angel not to go to the police because it would “ruin his hopes and dreams.” Angel told defendant, “What you did was wrong.” He found the nearby police station and reported defendant, who was arrested later that day. Defendant initially denied sexual contact with Angel, then claimed Angel initiated sodomy and oral copulation over defendant’s objections.

II

DISCUSSION

Defendant contends the kidnapping offense defined in section 207(b) requires “false promises, misrepresentations, or the like” not only in seducing a child to go somewhere for the defendant to commit a lewd act on the child, but also in hiring, persuading, enticing, or decoying the child to do so. (§ 207(b).) Consequently, he challenges the sufficiency of the evidence to support his conviction under that code section, and he asserts the kidnapping instruction the trial court gave the jury erroneously failed to specify fraud or deceit were necessary when a person “hires, persuades, entices, [or] decoys” (§ 207(b)) the child to move to where he or she is molested. We are not persuaded.

We interpret statutory provisions de novo. (*People v. Toussain* (2015) 240 Cal.App.4th 974, 979.) “The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.]” (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899.) Section 207(b) provides: “Every person, who for the purpose of committing any [lewd] act defined in

Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.”

Defendant acknowledges that under the last antecedent rule of statutory construction, the “false promises, misrepresentations, or the like” language in section 207(b) applies only to “seduc[ing]” a child, and not to the earlier antecedents of “hires, persuades, entices, [and] decoys.” The last antecedent rule establishes generally that in construing statutes: ““qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.”” (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743 (*Renee J.*).

As defendant points out, “The rule of the last antecedent, however, ‘is not an absolute and can . . . be overcome by other indicia of meaning.’ [Citation.]” (*United States v. Hayes* (2009) 555 U.S. 415, 425; accord, *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017-1018 [“The rules of grammar and canons of construction are but tools . . . ‘to help courts determine likely legislative intent’”].)

Defendant relies on what he characterizes as “two exceptions to the last antecedent rule,” namely, the series-qualifier canon and the ““spirit of the statute”” or ““sense of the entire act.”” The series-qualifier canon provides that when “several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” (*Porto Rico Railway, Light & Power Co. v. Mor* (1920) 253 U.S. 345, 348.) Thus, the phrase, “A wall or fence that is solid,” means “the wall as well as the fence must be solid.” (Garner and Scalia, *Reading Law: The Interpretation of Legal Texts* (2012) pp. 147-149.)

The second exception defendant identifies arises “when the sense of the entire act requires that a qualifying word or phrase apply to several preceding words, its

application will not be restricted to the last.” (*Renee J., supra*, 26 Cal.4th at pp. 743-744.) “This is, of course, but another way of stating the fundamental rule that a court is to construe a statute “so as to effectuate the purpose of the law.” [Citation.]” (*Id.* at p. 744; see *Costco Wholesale Corp. v. Workers’ Comp. Appeals Bd.* (2007) 151 Cal.App.4th 148, 154-155 [rejecting as “contrary to the spirit of the statute” the interpretation under last antecedent rule there].)

Invoking the foregoing rules and the *ejusdem generis* interpretative principle, defendant argues the last antecedent rule does not apply because the Legislature intended a restrictive meaning for kidnapping under section 207(b). The Latin phrase *ejusdem generis* simply means that words or terms should generally be understood as being ““restricted to those things that are similar to those which are enumerated specifically.”” (*People v. Giordano* (2007) 42 Cal.4th 644, 660.) Defendant suggests the Legislature restricted the reach of section 207(b) by using specific terms like “hires,” “persuades,” “entices,” “decoys,” and “seduces,” and the Legislature also necessarily intended a restrictive meaning to those terms. According to defendant, *all* those terms and not just “seduc[tion]” are limited to instances involving “false promises, misrepresentations, and the like.”

Defendant’s argument is conclusory and unpersuasive. He does not tie his analysis to the purpose of the statute, but merely asserts the statute must be restrictive in scope because he advances a restrictive meaning to its terms. That approach is circular.

Defendant suggests under the principle of *ejusdem generis*, and by extension the series-qualifier canon, that “the meaning of the general terms ‘entice’ or ‘persuade’ [is] limited in application to the same meaning [involving fraud or deceit] as the more specific words such as ‘decoy’ or ‘seduce by false promises and misrepresentations.’” But each verb in the statute (“hires,” “persuades,” “entices,” “decoys,” and “seduces”) is no more general or specific than the other verbs.

Accordingly, defendant's reliance on interpretative canons is misplaced and unconvincing.

Fundamentally, we disagree with defendant that the purpose of section 207(b) is restrictive in scope. To the contrary, the statute was enacted to *broaden* criminal liability for kidnapping beyond the use of force or fear when there is a child victim. The Legislature added subdivision (b) in 1982 (see Stats. 1982, ch. 1404, § 1, p. 5359) to reflect the Supreme Court's decision in *People v. Oliver* (1961) 55 Cal.2d 761 (*Oliver*), which held a toddler could be kidnapped without the use of force if he or she is moved for an illicit purpose. Specifically, the high court explained that the victim's putative consent was not a defense because a child is too young to give consent. (*Id.* at pp. 767-768.) Indeed, the statute is broader than the holding in *Oliver* because it is not limited to toddlers unable to give consent. Rather, the statute expands the scope of kidnapping to instances involving any child under age 14 and regardless of consent, whenever the perpetrator "hires," "persuades," "entices," or "decoys" the child into moving to a more private location or any location for a sexual purpose, or "seduces" the child to go there with "false promises, misrepresentations, or the like."

By omitting any reference to consent in section 207(b), it appears the Legislature intended to preclude defendants from raising the putative consent of child victims, as in *Oliver*. Defendant's argument that the victim here knew of or correctly guessed at his designs — and therefore was not deceived — is simply a variation of the consent defense rejected in *Oliver* and section 207(b).

Defendant's reliance on *People v. Rhoden* (1972) 6 Cal.3d 519 (*Rhoden*) and *People v. Dalerio* (2006) 144 Cal.App.4th 775 (*Dalerio*) is unsound. Those cases simply recognized kidnapping in certain instances "*can be accomplished by means of fraud,*" rather than force (*Rhoden*, at pp. 526-527, italics added) and "by deception alone" (*Dalerio*, at pp. 782-783). But a conclusion in a particular case that fraud or deception is *sufficient* for a conviction under section 207(b) does not establish fraud or deception is

necessary, as defendant contends. Neither *Rhoden* nor *Dalerio* considered that question, and cases are not authority for propositions not considered. (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

We conclude deceit or fraud is not essential to a conviction under section 207(b) because the protective purpose of the statute is broader than deceit or fraud. It is aimed at protecting children from molestation, not lies. For example, a child molester may well fulfill his promise to provide his victim with candy, money, or other enticement, but the statute is still violated. Defendant contends his position fits within this rubric. He agrees a hypothetical child molester who entices a child with candy is guilty of kidnapping under section 207(b), but only where the person utilizes a “false promise[], misrepresentation[], *or the like*” (*ibid.*, italics added). According to defendant, the “honest” molester who fulfills a promise to provide candy is still guilty, but only for failing to disclose to the child the material fact of his or her sexual interest. Defendant’s narrow construction is not persuasive because it mistakenly prioritizes falsehoods over molestation as the target of the statute.

Contrary to defendant’s narrow reading, the broad protective purpose of section 207(b) is illustrated in the origin of its terms. In adding subdivision (b) to the kidnapping statute, the Legislature drew its operative language from antebellum penal strictures designed to protect against the slave trade and involuntary servitude. Those safeguards provided: “Every person who forcibly steals, takes, or arrests any person in this State, and carries him into another country, State, or county, or who forcibly takes or arrests any person, with a design to take him out of this State, without having established a claim according to the laws of the United States or of this State, *or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like,* any person to go out of this State, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent

of such persuaded person, is guilty of kidnapping.” (Historical and Statutory Notes, 47E West’s Ann. Pen. Code (2014 ed.) foll. § 207, p. 282, italics added [reproducing § 207 as enacted in 1872, derived from Stats. 1850, c. 99, p. 234, §§ 53-55].)

This language does not reflect a legislative endorsement of returning or subjecting an individual to slavery so long as he or she is hired, persuaded, or enticed away from relative safety in California without fraudulent statements, but rather a broadly protective purpose to thwart enslavement whether there is fraud or not. The same is true here. Contrary to defendant’s claim, the “false promises, misrepresentations, or the like” language is not rendered superfluous by this construction. Rather, it reflects the Legislature’s intent to thwart child molestation and punish an offender for kidnapping a child for that purpose whether it is achieved by fraud in seducing the victim or without fraud by enticing or persuading the victim’s movement. Defendant’s position is inconsistent with the protective purpose of section 207(b), and we reject it.

Consequently, we also find no merit in defendant’s claim the jury was erroneously instructed on the elements of the offense. He argues the jury should have been told that a child molester’s hiring, persuasion, enticement, and decoy maneuvers had to be facilitated by “false promises, misrepresentations, or the like,” and the prosecutor’s contrary suggestion in argument was erroneous. As discussed, defendant misconstrues section 207(b)’s requirements, and his instructional argument therefore also fails.¹

¹ As provided to the jury, CALCRIM No. 1200 stated in relevant part, “The defendant is charged in Count 1 with kidnapping for the purpose of child molestation [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant persuaded/hired/ enticed/decoyed/ [or] seduced by false promises or misrepresentations a child younger than 14 years old to go somewhere; [¶] 2. When the defendant did so, he intended to commit a lewd or lascivious act on the child; [¶] AND [¶] 3. As a result of the defendant’s conduct, the child then moved or was moved a substantial distance. [¶] [As used here, substantial distance means more than a slight or trivial distance. . . .]” (Original brackets.)

Alternatively, defendant contends we must reverse his conviction because section 207(b) is unconstitutionally vague. Due process requires “that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) The words describing the prohibited actus reus (inducing movement by hiring, persuading, enticing, decoying, or seducing by false promises) are clear and specific. The statute is not void for vagueness.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.