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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.

RUSSELL ARTHUR BENDER,

Defendant and Appellant.

G050911

(Super. Ct. No. FVI1100005)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Eric M. Nakata, Judge. Affirmed.

Robert V. Vallandigham, Jr., under appointment by the Court of Appeal,
for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, Andrew Mestman and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff
and Respondent.

* * *

Defendant Russell Arthur Bender was convicted of distributing harmful matter to a minor (Pen. Code, former § 288.2, subd. (a))¹ after giving a pornographic magazine and DVD to an 11-year-old boy. Defendant also admitted a prior strike conviction for a lewd act on a child under the age of 14. (§§ 1170.12, subd (a)), 667.5, subds. (b)-(i).) He argues there was insufficient evidence of his intent to seduce the victim and the trial court should have instructed the jury on a lesser misdemeanor offense.

We find there is more than sufficient evidence, circumstantial though it may be, to sustain the conviction. We also conclude the court did not err by failing to instruct sua sponte on the lesser included misdemeanor.

I

FACTS

Collin H., the victim in this case, was about 10 years old at the time these events began in 2008. From June to September of that year, his mother lived in a trailer park in Desert Willow. Collin primarily lived with his father, but visited his mother almost every weekend during that time.

Defendant, who was in his late 40's at the time, lived near Collin's mother. He became a friend of the family and socialized with Collin, his younger sister, and his mother at events such as backyard barbecues and swimming in the trailer park pool.

After Collin's mother moved out of the trailer park, the family continued to see defendant. Collin's mother and the children visited him frequently on the weekends in 2009. Defendant helped Collin with such tasks as fixing his skateboard and gave him Christmas gifts and money for treats.

Around March 2009, defendant offered to give Collin a "dirty magazine." Collin thought defendant was just kidding, and he had never asked for such a magazine or

¹ Subsequent statutory references are to the Penal Code unless otherwise stated.

talked to defendant about girls or boys. When Collin told his mother about the incident (she was not present at the time), she thought defendant was “probably kidding.”

On May 17, 2009,² when Collin was 11, he went to visit defendant with his mother and sister. They were planning to swim and barbecue. Collin’s mother and sister went to the store at some point, and Collin went to visit a friend in the trailer park. The friend was not at home, so Collin, wearing only a pair of swim trunks, returned to defendant’s home. Defendant told Collin he had something for him, and gave him a magazine and a DVD. Collin thought defendant might have said something like “don’t tell your mom,” but he was not sure. He put the two items in a grocery bag provided by defendant, but did not look inside the magazine or view the DVD. He did not tell his mother because he was afraid he might get in trouble.

Collin’s father’s girlfriend discovered the items behind a dresser after Collin returned to his father’s home. When asked, Collin said defendant gave him the items. Collin’s father reported the incident to the police. Neither of Collin’s parents had asked defendant to speak to Collin about sex or to give him pornography.

The magazine was titled “Eighteen.” The captions on the cover stated, “World’s Hottest Teen Mag, Tight and Ripe Virgins.” The DVD was from hustlermagazine.com and was entitled “Gapes of Wrath.” The police officer who took the report later testified about the contents of the magazine and DVD, which were unquestionably sexually explicit. The magazine featured a variety of young girls in various stages of nudity, sometimes using sex toys and performing sexual acts with them. Some of the captions included statements about how the young women depicted in the pictures liked older men. The DVD was about four hours long.

² Despite some confusion in the reporter’s transcript between March and May, it was stipulated at trial that the incident was reported in May.

Another officer interviewed defendant. He admitted giving the magazine and DVD to Collin and said it was a stupid thing to do. He claimed to be like a stepfather to Collin and claimed he was in a dating relationship with his mother, which the mother denied.

Defendant was charged with one count of distributing harmful matter to a minor (former § 288.2, subd. (a)). The information also alleged a prior conviction pursuant to section 1170.12, subd (a) and section 667.5, subds. (b)-(i).

At the conclusion of trial, the jury found defendant guilty. He admitted the prior, a conviction under former section 288, subdivision (a), a lewd act on a child under the age of 14. The court sentenced defendant to six years in prison. Defendant now appeals.

II

DISCUSSION

A. Statutory Framework

Former section 288.2, subdivision (a) stated, as pertinent here: “Every person who, with knowledge that a person is a minor . . . knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means . . . 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”³

³ Section 288.2 has been amended several times in recent years. (See Stats. 2011, ch. 15, § 317; Stats. 2012, ch. 43, §16; Stats. 2013, ch. 777, §§ 1, 2.) The current version of the statute consolidates the elements of the offense into one provision and no longer contains the phrase “seducing a minor.” (§ 288.2, subd. (a)(1).) The law now expressly requires that a defendant act with the intent to “engag[e] in sexual intercourse, sodomy, or oral copulation with the other person, or with the intent that either person touch an intimate body part of the other” (*Ibid.*)

Section 313, subdivision (a) defines harmful matter as “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.”

B. Sufficiency of the Evidence

Defendant argues there was insufficient evidence to establish that defendant intended to seduce Collin when he gave him the sexually explicit DVD and magazine. He does not dispute the sufficiency of the evidence on the remaining elements.

The standard of review is whether, after reviewing the evidence in the light most favorable to the judgment, a rational fact finder could have concluded defendant was guilty beyond a reasonable doubt. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Evidence is substantial when it is of ponderable legal significance, reasonable in nature, credible, and of solid value. (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 682.) Further, we do not reassess the credibility of witnesses, and we draw all reasonable inferences from the evidence which support the jury’s verdict. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) “[O]n appeal ‘a defendant challenging the sufficiency of the evidence to support her conviction “bears a heavy burden,” [citation] . . .’ [citation] of showing insufficiency of the evidence and must do so in accordance with well-established standards [citation].” (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.)

The jury was instructed with a modified version of CALCRIM No. 1140, informing them that a required element of violating section 288.2, subdivision (a) is: “When the defendant acted, he intended to seduce the minor.” They were also instructed with CALCRIM No. 225, which states the prosecution was required to prove intent, and it could be proved by circumstantial evidence. The court also instructed on the distinction between direct and circumstantial evidence: circumstantial evidence is “evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question.” (CALCRIM No. 223.)

“The purpose of section 288.2 is to prohibit using obscene material . . . ‘to groom young victims for acts of molestation.’ [Citation.]” (*People v. Powell, supra*, 194 Cal.App.4th at p. 1287.) “[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*).)

Defendant argues the harmful material in this case all depicted heterosexual sex, while both defendant and the victim were male. Defendant also claims he never mentioned anything about wishing to have sexual contact with the victim, never touched him, gave the victim images of himself, or suggested they meet alone for any reason. In his reply brief, he also claims there was no evidence of “grooming” behavior and no expert testimony to support the conduct defendant committed constituted grooming; nor did the prosecution present evidence on the subject to the jury.

We must disagree. Indeed, all of the evidence the prosecution presented was in support of this argument, which the prosecutor made at closing: “[Defendant was] leading a process of slow escalation, ingratiating himself to [the victim], giving him money, buying him presents, inviting him to the pool, hints about the magazine to [test] the water and then gives him one. [¶] And the smart defendant in this case knows the kid

is going to be interested in girls, so he starts off with stuff with girls, stuff with underage girls. Maybe he's thinking it will appeal to the minor. There's little phrases and texts in there about having sex. And then, if he likes that, he comes back and takes him to the next step.”

What the prosecutor is describing, and what the evidence as a whole showed, was indeed grooming behavior. The intent to seduce will only be directly proved in the rarest of cases; we must otherwise rely, as we do here, on circumstantial evidence. But that is the nature of seduction — it is slow and subtle and lacks a direct and obvious statement of intent by the seducer. Here, the evidence showed that defendant first became friendly with the victim, offering him help with mundane tasks, friendship, access to a swimming pool, small gifts and small amounts of money. That progressed into offering the victim a “dirty magazine” outside his mother’s presence. Both the victim and his mother wrote this off as a joke. Then two months later, when they were again alone together, defendant handed the victim a sexually explicit magazine and DVD. The magazine depicted young girls in various stages of dress and undress, sometimes using sex toys and sometimes captioned with statements about how they liked older men.

When questioned, defendant tried to pass off his conduct as a mistake and falsely claimed he was in a romantic relationship with the victim’s mother, positioning himself as a “stepfather.”

Taken together, a reasonable jury could conclude this evidence demonstrated defendant gave the explicit materials to the victim with the intent to seduce him. This is not, as defendant asserts, “ludicrous,” but completely consistent with a seducer’s slow and careful progress toward his goal. We therefore find the conviction was supported by substantial evidence.

C. Instruction on Misdemeanor Offense

Defendant next contends the trial court should have instructed the jury on the misdemeanor crime of distribution of harmful matter to a minor (§ 313.1, subd. (a)). Section 313.1, subdivision (a) is a lesser included offense of section 288.2, subdivision (a). (*People v. Nakai* (2010) 183 Cal.App.4th 499, 507 (*Nakai*); *Jensen, supra*, 114 Cal.App.4th at p. 244.)

Trial courts must give an instruction on a lesser included offense sua sponte if the evidence warrants the instruction. (*People v. Cook* (2006) 39 Cal.4th 566, 596.) The evidence warrants the instruction if there is substantial evidence which, if accepted, would absolve the defendant of the greater offense, but not the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) We review de novo the court's instructions on lesser included offenses. (*People v. Cook, supra*, 39 Cal.4th at p. 596.)

Section 313.1 subdivision (a) makes it a misdemeanor to knowingly sell, rent, send, distribute, or exhibit harmful matter to a minor. Essentially, the difference between section 313.1, subdivision (a) and section 288.2, subdivision (a) is that the latter requires the specific 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”

In *Jensen, supra*, 114 Cal.App.4th 224, the defendant engaged in online chats and sent sexually explicit pictures to two police officers he believed were 13-year-old boys named Ryan and Scotty. (*Id.* at pp. 227-234.) The defendant's attorney argued at trial that defendant had no intention to meet the boys, and the communications were mere fantasy and entertainment. (*Id.* at p. 238.) The defendant was convicted of nine counts of attempted exhibition of harmful matter over the Internet (§ 288.2, subd. (b)). On appeal, he argued the trial court should have instructed on the lesser included offense of violating section 313.1, subdivision (a). (*Jensen, supra*, 114 Cal.App.4th at p. 243.)

The court agreed and explained: “The evidence presented at trial raised a substantial question as to whether defendant actually harbored the specific intent to seduce ‘Ryan’ or ‘Scotty.’ Defendant essentially admitted all of the other elements of the offenses. Reasonable jurors could have concluded that defendant distributed harmful matter to ‘Ryan’ and ‘Scotty’ believing that they were minors and harbored the intent to arouse himself or them but lacked the intent to have any physical contact with them. Such a conclusion is consistent with guilt of only [section 313.1, subdivision (a)] rather than [section 288.2].” (*Jensen, supra*, 114 Cal.App.4th at pp. 244-245.)

In the more recent case from Division Two of this court, *Nakai, supra*, 183 Cal.App.4th 499, the defendant engaged in chats with a detective posing as a 12-year-old girl named Colleen. (*Id.* at pp. 501-502.) He sent her a picture of his erect penis, asked her if she would perform oral sex, and if she would like to engage in intercourse. (*Id.* at p. 502.) Colleen gave defendant a specific date and time to come to her house, as well as the address of a residence where law enforcement was planning to conduct an internet predator sting. (*Id.* at pp. 505-506.) On the appointed day, the police found defendant sitting in a car near the designated house three hours before the time Colleen had provided. (*Id.* at p. 506.) Defendant was charged with two counts of attempting to send or exhibit harmful material to a minor with the intent of seduction. (*Ibid.*)

At trial, the court denied the defense’s request for an instruction on section 313.1, subdivision (a). (*Nakai, supra*, 183 Cal.App.4th at p. 507.) The Court of Appeal “agree[d] with the trial court’s conclusion that there is no evidence that a reasonable jury could find persuasive that, if accepted, would absolve defendant from guilt of the greater offense but not the lesser, because the evidence only demonstrates defendant’s combined intents to arouse and seduce.” (*Id.* at p. 508.)

Unsurprisingly, defendant argues this case is similar to *Jensen*, while the Attorney General analogizes to *Nakai*. Again, defendant emphasizes the images did not

include defendant, involved heterosexual behavior, and there were no plans to meet for sex or anything else. But while the evidence is different in nature, the evidence here is strong that defendant intended to both arouse and seduce the victim. We have discussed the evidence with respect to seduction *ante*, but the evidence of intent to arouse was even stronger. Defendant provided the victim with pornographic material he would most likely be interested in, specifically, young girls. There is no evidence which a reasonable jury would find persuasive that defendant had any other intent, given the totality of the evidence.

Moreover, any error to instruct on the lesser included offense was not prejudicial. In a noncapital case, failure to instruct *sua sponte* on lesser included offenses that are supported by the evidence is reviewed for prejudice under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 835. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178.) Thus, “[a] conviction of the charged offense may be reversed in consequence of this form of error only if, ‘after an examination of the entire cause, including the evidence’ (Cal. Const., art. VI, § 13), it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred [citation].” (*Ibid.*, fn. omitted.)

Such an outcome was not reasonably probable. Indeed, it was not at all probable. The evidence of intent to arouse and seduce the victim was considerable and strong. The jury, by our estimation, deliberated for four and a half hours on one day and approximately one hour on the second, asking only one question regarding a police report. They apparently had no difficulty in determining that defendant had the requisite intent to arouse and seduce the victim. We cannot, accordingly, conclude defendant would have obtained a more favorable outcome had the trial court given instructions on section 313.1, subdivision (a).

III
DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.