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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO VELAZQUEZ CAMPA,

Defendant and Appellant.

H037135

(Monterey County

Super. Ct. No. SS100825)

The trial court convicted defendant Mario Velazquez Campa of possession of child pornography (Pen. Code, § 311.11, subd. (a))¹ and invasion of privacy (§ 647, subd. (j)(3)). On appeal, defendant contends that the evidence is insufficient to support the possession conviction. We disagree and affirm the judgment.

BACKGROUND

Defendant set up a cell phone camera in the family bathroom and videotaped his girlfriend's 16-year-old daughter undressing. The victim was unaware of the camera, which recorded six different bathroom visits. In the first visit with music playing in the background, the victim is standing in her pants and bra, removes her pants, removes her underwear, moves her hips in rhythm with the music, arranges her hair, touches her pubic hair, brushes her hair, touches her pubic hair, puts both hands on her pubic hair, arranges her hair, touches her pubic hair, and walks off screen. In the second visit with music

¹ Further unspecified statutory references are to the Penal Code.

playing in the background, the victim removes her pants, begins dancing to the music, removes her socks, removes her sweatshirt, moves her hips in rhythm with the music, removes her bra, brushes her hair, and touches her pubic hair. In the third visit, the victim removes her pants, cups her breasts over her bra, bends over, picks up a bag, places a mini-stereo on the counter, begins playing music, removes her bra, arranges her hair, cups her breasts, arranges her hair, cups her breasts, touches the sides of her body, removes her socks, touches her pubic hair, brushes her hair, touches her pubic hair, puts her hand on her hip, and touches her pubic hair. In the fourth visit, the victim unbuttons her pants, removes her pants, touches her pubic hair, turns on music from the mini-stereo, removes her socks, removes her shirt, removes her bra, brushes her hair, and dances to the music. In the fifth visit, the victim turns on the mini-stereo, removes her pants, touches her pubic hair, moves her hips in rhythm to the music, removes her shirt, removes her bra, touches her pubic hair, brushes her hair, touches her pubic hair, and touches her back with her thumb. In the sixth visit, the victim turns on the shower and radio, removes her pants, touches her pubic hair, removes her shirt, removes her bra, removes her socks, brushes her hair, and touches her pubic hair.

The trial court explained as follows: “So it is an interesting fact, I suppose, in some sense. The one thing that stands out is when you look at this, it looks like porn. And that’s what it is. It looks like a voyeur who has captured an unsuspecting victim of 16 years old, a 16-year-old on a hidden video camera, in the bathroom while she--and each one of these videos is the same, in that she’s either just immediately undressing or she’s already gotten down to her underwear, as a rule, takes them off in preparation for going into the shower, turns on the music, does her dance, the camera is capturing every time the genital area, she’s--and the front of her is visible. And it also includes the chest area and sometimes it captures her whole body. [¶] And the question is, is this--it’s obviously a concealed camera, whether it was--in fact we already know that it was secret or whether it was staged, doesn’t matter. It looks like it is a hidden camera when you’re

viewing this picture. [¶] And based on the police report, the circumstances are clearly that the defendant hid a camera in his place, that he put it there knowing her routine was to go into the shower, that he had started this change in his routine, using his own bathroom, he was using the bathroom she uses a couple of months before. [¶] So he was going in, setting up the camera, starting it--that's the inference the Court is drawing from this--and then leaving. She comes in, she does whatever it is that she's doing. She goes out and he goes in and applies the camera, obviously on different dates, as pointed out in the police report. [¶] What is clear is that I am only seeing on that video a part of what was recorded. The video has been edited and it has been edited to precisely the same point, when she's taking off her clothes to when she is probably leaving the picture, is my guess, to go jump in the shower. It is only of her. Anything that wasn't sexual in nature, because this is focused clearly on the front and genital area. And all the rest of the, you know, the shower when she's not in the picture, you can imagine what's not available or what has been edited out is all the dead time, and it's only brought down to that moment where he has captured her standing in front of the mirror, looking at herself, playing with herself, dancing, and all that sort of thing. It is clearly designed and intended in these segments for sexual entertainment. [¶] So without even going into the legal elements of what this case under cause or the cases cited in the cause, it is just by looking at it, a porn that is for the voyeur, the person who has a sexual interest in voyeurism. Then if you go through and take a look at the elements, if you take a look at--the porn itself is one thing and the possession is another thing, and this is a possession charge, is my understanding."

DISCUSSION

Defendant contends that the evidence is insufficient because "Properly construed, section 311.11 requires interaction with the minor, knowledge on the minor's part, and not just mere possession but some evidence that the images are for distribution or commercial purposes. . . . The statutes are not meant to punish a peeping Tom, even if he uses technology to peep. Privacy invasions of that nature are punished by other statutes

such as section 647, subdivision (j)(3)(A), of which [defendant] was also convicted.” Defendant’s argument ignores the requirements and definitions in sections 311.11 and 311.4.

Section 311.11, subdivision (a), provides in full: “Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both the fine and imprisonment.”

Section 311.11 expressly incorporates the definition of sexual conduct found in section 311.4, subdivision (d), which includes “exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer”

There is no requirement in the operative statutes that there be interaction with the victim, knowledge on the victim’s part, or culpability beyond mere possession.

Defendant next urges that the images at issue do not carry a provocative or sexual overtone. We disagree.

“It is not necessary to prove that the matter is obscene in order to establish a violation of [§ 311.11].” (§ 311.11, subd. (c).) It is only necessary to prove “sexual conduct” (*id.* subd. (a)), which includes “exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer” (§ 311.4, subd. (d)). But whether a particular display is an illicit exhibition is a more complicated inquiry than simply asking

whether the genitals are exposed. Photographs showing a partially clad pubic area may well be intended to elicit a sexual response on the part of the viewer.” (*People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1129.) In other words, whether images carry a provocative or sexual overtone presents a question of fact for the trier of fact. (*People v. Kongs* (1994) 30 Cal.App.4th 1741, 1755 (*Kongs*).

The facts in *Kongs* are instructive. “The photographs and videotapes seized from Kongs’s residence depict minor children, some under the age of 14, in various poses at photo shoots. In some instances, the materials capture panty-covered pubic and rectal areas exposed when the models were sitting, bending over, or holding their legs up while wearing skirts. There is much ‘zooming in’ for sustained close-ups on the models’ panty- or bikini-clad crotch areas. In one instance, the subjects are unwitting children sitting on a curb watching a parade go by, in a portion of the videotape appropriately titled ‘Panties on Parade.’ ” (*Kongs, supra*, 30 Cal.App.4th at p. 1757, fn. omitted.)

The court held: “A trier of fact could find that the seized material, with its unrelenting focus on the area between the models’ legs, constituted an exhibition of the genital, pubic or rectal area for the purpose of sexually stimulating the viewer.” (*Kongs, supra*, 30 Cal.App.4th at p. 1757.)

Kongs establishes six factors a trier of fact should consider in determining whether an image is intended to sexually stimulate the viewer by exhibiting a child’s genital, pubic or rectal areas. They include: “(1) whether the focal point is on the child’s genitalia . . . ; [¶] (2) whether the setting is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; [¶] (3) whether the child is in an unnatural pose, or in inappropriate attire, considering the age of the child; [¶] (4) whether the child is fully or partially clothed, or nude; [¶] (5) whether the child’s conduct suggests sexual coyness or a willingness to engage in sexual activity; [¶] (6) whether the conduct is intended or designed to elicit a sexual response in the viewer.” (*Kongs, supra*, 30 Cal.App.4th at p. 1755.)

The six factors are not equally important and an image need not satisfy each of the six factors for the photograph to show sexual conduct. The *Kongs* court stated, “With the exception of factor No. 6 [conduct intended to elicit sexual response], a trier of fact need not find that all of the first five factors are present to conclude that there was a prohibited exhibition of the genitals . . . : the determination must be made based on the overall content of the visual depiction and the context of the child’s conduct, taking into account the child’s age.” (*Kongs, supra*, 30 Cal.App.4th at p. 1755.)

Here, after viewing the inculpatory video, the trial court identified at least two factors in addition to factor No. 6: the camera lens was clearly focused to capture the victim’s genital area and the child was nude. And it highlighted its view that factor No. 6 was present by noting that the video was edited to excise the dead time.

We have viewed the video and conclude that it supports the trial court’s judgment. Defendant placed his camera to record so that the victim’s nude genital area appeared at or near the center of the picture, thereby focusing the viewer’s attention on that area. And the video, edited as it is, does not appear to have any purpose other than to elicit a sexual response in the viewer. Thus, the trial court could have reasonably found that the images at issue depicted sexual conduct as defined by sections 311.11 and 311.4, subdivision (d).

Defendant also asserts that “In addition to sexual conduct, the prosecution must establish that the minor was engaged in an ‘exhibition,’ ” which defendant defines as “presenting for viewing or placing on show in a *public* display.” He reasons that the victim in this case was undressing for herself in private. Defendant’s analysis is erroneous.

It is true that the operative language of section 311.4, subdivision (d), defines sexual conduct to include the “exhibition” of the genitals, etc., for the purpose of sexual stimulation of the viewer. However, section 311--not a dictionary--provides the definitions for the terms used in the statutes following. Section 311, subdivision (f),

provides that “ ‘Exhibit’ means show.” It does not say “ ‘Exhibit’ means show to the public.” Thus, for purposes of violating section 311.11, exhibition of the genitals simply means a show of the genitals for the purpose of sexual stimulation of the viewer.

Despite the language of the operative statutes, defendant asks that we interpret section 311.11 to require that the perpetrator posed or in some way interacted with the victim. He argues that “Without evidence of some interaction between [defendant] and the minor, which resulted in the minor posing in a sexual way, there should not be liability under section 311.11.” He adds that imposing liability in this case does not further the legislative purpose to combat the exploitive use of children in the production of pornography.

But we may not rewrite a statute to make it express an intention not expressed therein or one that may be derived from its legislative history. (*People v. Hobbs* (2007) 152 Cal.App.4th 1, 5.) Moreover, the statutory scheme separately prohibits “posing” or “modeling” a child for images involving sexual conduct. (§ 311.4, subd. (c).)

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.