Filed 6/28/06 P. v. Parnell CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH PARNELL, Defendant and Appellant.	A106798 (Alameda County Super. Ct. No. C144699)

Defendant Kenneth Parnell was convicted of soliciting a kidnapping and related offenses and sentenced to a term of 25 years to life under the three strikes law. On appeal, he challenges the sufficiency of the evidence supporting convictions on two of the charges; the instructions to the jury; the admission of evidence of his intent; and restitution and parole revocation fines. He also seeks a limited remand to explore whether testimony of a witness who was allegedly hypnotized before a 1981 trial should have been excluded. We modify the fines and in all other respects affirm the judgment.

BACKGROUND

I. *The Present Offenses*

Diane Stevens became acquainted with defendant through her brother who cared for defendant between 1999 and 2001. In December of 2002, defendant called and asked to speak with Stevens alone about a personal matter. She agreed to visit him. The next day, defendant called Stevens again and asked if they could speak privately. After she assured him she was alone, defendant asked if she "could get a child for him, specifically

a boy." He told her he wanted an English-speaking Black boy between four and six years old. He said he needed the boy's birth certificate. He also told Stevens he might want a girl the next month if the boy "went okay." He offered her $500. Stevens said she accepted his offer because she was afraid he would find someone else to provide him a child if she refused.

Stevens told her husband about the conversation. The next evening they visited defendant at his apartment. Defendant again asked Stevens if she could get him a child, and she assured him she would. Defendant told her, "don't bring me any dirty-ass brats," and to "make sure his asshole is clean." Stevens and her husband testified that defendant appeared excited when he said this. On December 20, 2002, defendant told Stevens the child had to be four years old. He said he would pay her when she delivered the boy's birth certificate.

Stevens described these conversations to her sister, who called the police. On December 30, 2002, police attached a tape recorder to Stevens's telephone. Later that day defendant called Stevens. She told defendant she would have a birth certificate that night and defendant would have the boy by January 3. Defendant assured Stevens that he didn't tell anyone about their plan. They each commented that they did not want to get in trouble; defendant said, "It's a risky business, you know. That's between you and me." Defendant said that if the boy worked out, he would probably want a girl in February and that "I can't handle but one at a time, you know."

On January 3, 2003, Stevens called defendant and told him she was ready to deliver a boy from another state. She said "it's the little black boy. . . . And, see, I know he won't be seeing his mom anymore, so I wanted to make sure all of that was okay." She confirmed she had a birth certificate for the child. After a dispute over payment, they agreed Stevens would leave the boy in her car while she delivered the birth certificate to defendant. Defendant would pay her $100 when he got the birth certificate, and she would then deliver the boy and collect the balance.

Stevens wore a wire when she delivered the birth certificate as agreed. Defendant gave her $100. He said he had to go to the bathroom "cause of nerves, you know," and directed her to retrieve the boy from her car and put him on defendant's bed.

Police officers arrested defendant and searched his apartment. Four $100 bills were found in his pants pocket. Officers seized books, children's videos and clothing, a teddy bear, pornographic homosexual videos, condoms, a device designed to stimulate a male erection, and a bottle marked "Libido Pills."

II. *Defendant's Past Offenses: The Kidnappings of Steven Stayner and Timothy White*

The prosecution presented evidence about defendant's prior kidnappings of Steven Stayner and Timothy White as other-crimes evidence admissible under Evidence Code section 1101, subdivision (b). Defendant does not challenge the admissibility of this evidence, only its import. See Discussion, *post*, part III.[1]

On December 4, 1972, seven-year-old Steven Stayner was kidnapped by the defendant when he was walking home from school. Defendant told Stayner that he was given legal custody of Stayner and that Stayner's new name was Dennis Parnell. Defendant and the boy eventually moved to a remote cabin outside Manchester.

When Stayner was in the seventh grade he introduced defendant to his friend Randall Sean Poorman. On February 13, 1980, defendant offered to give Poorman money, liquor and marijuana if Poorman would help defendant kidnap another boy. Poorman accepted, and the next day the two went to Ukiah. The defendant directed Poorman to grab five-year-old Timothy White as White walked home from kindergarten and forced him into defendant's car. Defendant took White to the cabin, dyed his hair,

---

[1] Stayner died in an accident in 1989. He testified against defendant in 1981, and that testimony was introduced in this case. Timothy White testified in person, as did Randall Poorman, defendant's accomplice in the White kidnapping. Ervin Murphy was defendant's accomplice in the Stayner kidnapping. The substance of his testimony was presented by way of a stipulation.

and told White that his parents gave him to defendant because they could not financially afford him and did not want him anymore. Defendant said he was White's new father.

On March 1, 1980, Stayner and White escaped by hitchhiking. Defendant was later convicted of kidnapping both boys and was sentenced to seven years in prison.

DISCUSSION

I. *Sufficient Evidence Supports the Conviction for Violating Section 181*

Defendant argues there is insufficient evidence to support his conviction under Penal Code section 181.[2] We disagree.

Section 181 provides: "Every person who holds, or attempts to hold, any person in involuntary servitude, or assumes, or attempts to assume, rights of ownership over any person, or who sells, or attempts to sell, any person to another, or receives money or anything of value, in consideration of placing any person in the custody, or under the power or control of another, or who buys, or attempts to buy, any person, or pays money, or delivers anything of value, to another, in consideration of having any person placed in his custody, or under his power or control, or who knowingly aids or assists in any manner any one thus offending, is punishable by imprisonment in the state prison for two, three, or four years."

Defendant concedes the plain terms of this statute describe his conduct. He paid "money . . . to another, in consideration of having any person placed in his custody, or under his power or control." (§ 181.) He admits this is "exactly" what he did. Indeed, it is difficult to conceive a situation more squarely within the statutory proscription. But, he argues, we should not literally apply the statute's plain language because there are *other* situations in which doing so would be absurd. For example, defendant argues "the payment to an intermediary for the custody of a person literally applies to the adoption attorney or the temp. agency; the acceptance of money to place someone in another's custody applies to the babysitter and the bailiff." Invoking the precept that even facially clear statutes must be construed to avoid absurd results (see *In re Michele D.* (2002) 29

---

[2] All statutory citations are to the Penal Code unless otherwise indicated.

Cal.4th 600, 606), he urges that the only way to prevent such absurdities is by interpreting section 181 to require that all violations involve involuntary servitude, slavery, or conditions "realistically akin" to such forced conscription. He says "Once this legal premise is accepted, then the evidence was not sufficient to sustain a conviction, since a reasonable trier of fact could not conclude beyond a reasonable doubt that [defendant] was obtaining a child for purposes of slavery or involuntary servitude."

Defendant's argument fails for several reasons. The language of section 181 is broad and comprehensive. A plain reading reveals it to prohibit any form or incidents of ownership of one person by another. There is nothing in the language of section 181 to indicate the Legislature intended its broad language to be limited to cases of slavery or involuntary servitude as those practices have been historically understood.[3] Defendant relies on what he calls the "informal heading" of the section, which he says is "Involuntary Servitude and the Sale of Slaves." He does not say in what publication he found this "informal" heading, but reference to the original 1901 statute shows that it was not part of the Legislature's enactment. We therefore decline to attribute any significance to this informal heading, and do not believe it contributes to understanding the Legislature's intent in enacting section 181.[4] (Stats. 1901, ch. 155, § 1, p. 330; compare *People v. Rocca* (1980) 106 Cal.App.3d 685, 691 [title, chapter and section headings

---

[3] Defendant's argument is premised upon slavery or involuntary servitude to mean forced labor and personal service.

[4] Commercial editions of the California codes, such as West's and Deerings, have been supplemented with publisher's headings introducing code sections, articles, chapter and divisions that are not part of the actual enactments. "The most authoritative version of each enactment is that set forth in the Statutes and Amendments to the Codes." (See Cal. Style Manual (4th ed. 2000) § 2:5[A], p. 47, § 2:15[B], p. 58.) Moreover, while section 181 is entitled "Involuntary Servitude and Sale of Slaves" in the Standard California Codes published by LexisNexis—Matthew Bender, it is entitled "Slavery; infringement of personal liberty; purchase of custody; punishment;" in West's and "Infringement of personal liberty or attempt to assume ownership of persons" in Deering's.

enacted by the Legislature may be given weight in construing legislation] with *In re Bandmann* (1958) 51 Cal.2d 388, 392 [editorial chapter title disregarded].)

Defendant makes an argument based upon former section 266c, which penalized "[e]very person bringing to, or landing within this state, any female person born in the empire of China or the empire of Japan . . . with intent to place her in charge or custody of any other person, and against her will to compel her to reside with him, or for the purpose of selling her to any person whomsoever. . . ." (Former § 266c, as amended (Stats. 1905, ch. 497, p. 656, § 1, repealed by Stats. 1955, ch. 48, § 1.) He claims that since former section 266c "clearly invokes concepts of involuntary servitude," the similar language in section 181 must also deal with slavery and involuntary servitude. His reliance on this repealed provision is unhelpful, as it makes no reference to involuntary servitude or slavery. We believe the import of former section 266c was to address concubinage or sexual slavery, as defendant suggests, hardly the same as traditional notions of slavery or involuntary servitude.

In making the argument that we should not literally interpret and apply section 181, defendant seeks to invoke the rule of lenity. "When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application *reasonably* permit. The defendant is entitled to the benefit of every *reasonable* doubt as to the true interpretation of words or the construction of a statute." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896, italics added.) But this rule only applies where two reasonable interpretations of a statute stand in relative equipoise. (*Guillory v. Superior Court* (2003) 31 Cal.4th 168, 177.) When presented with such a choice, courts interpret statutes to avoid absurd consequences the Legislature did not intend. (*People v. Mendoza* (2000) 23 Cal.4th 896, 907-908.) Here, the defendant paid someone to deliver a young boy to him. This is not a close case. We need not consider if literal application of section 181 could yield absurd results in some theoretical circumstances where custody or control of one person over another is legally authorized. When and if such circumstances arise, the court can consider the proper scope of section 181. Where there

is no indication that applying the statute as written produces an absurd result, and there is no suggestion the statute has been applied in such a way in the 100-plus years since its enactment (stats. 1901, ch. 155, § 1, p. 330), we will not disregard the Legislature's clear language.[5]

II. *The Court Did Not Mislead the Jury*

In a related argument, defendant contends his conviction under section 181 must be reversed because the court misled the jury by prefacing its instruction with this remark: "The second count alleges a violation of Penal Code section 181, and I'm going to read to you right now the—Penal Code section 181 which, I'm afraid, has a relatively archaic title such as—I think it's involuntary servitude and sale of slaves. So we've just put down this as Penal Code section 181, a crime, because we did not feel that the title of this in the Penal Code really aptly described [*sic*]. So I'm just reading to you the section that is involved in this matter."

Defendant asserts this was erroneous, or at least ambiguous, given his position that any act charged under section 181 must be integrally related to involuntary servitude or slavery. Because we reject his interpretation that section 181 only applies to cases involving slavery or involuntary servitude, this contention also fails.

III. *Sufficient Evidence of Specific Intent*

Defendant contends the evidence was insufficient to support his conviction for soliciting a kidnapping under sections 207, subdivision (a) and 653f, subdivision (a) because there was no proof that the child was to be obtained by means of force or fear.

---

[5] The People suggest that, were we to look beyond the plain language, it would be more in keeping with the Legislature's intent to construe section 181 as requiring that the specified acts must be committed for an illegal purpose and with illegal intent. (See *People v. Oliver* (1961) 55 Cal.2d 761, 765-766 [construing force or fear required to kidnap an unresisting infant construed as the force necessary to transport the victim a substantial distance for an illegal purpose or with illegal intent]; *In re Michele D.*, *supra*, 29 Cal.4th at p. 610.) We note this only to observe that defendant's position that all violations must incorporate the concept of slavery or involuntary servitude is not the only construction that would avoid the hypothetical absurdities he suggests. In this case, however, we need not and do not look beyond the clear statutory language.

At best, he argues, the evidence demonstrates he was "completely indifferent" as to how Stevens procured the child, whether by force or other means, and indifference does not amount to the requisite specific intent for kidnapping.[6] This argument did not work for the defendant once before, and it will not work here. (See *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 401-402.) The jury properly found all of the elements necessary to prove the solicitation of a kidnapping under the standard formulated in *In re Michele D.*, *supra,* 29 Cal.4th 600.

In *Michele D.,* the Supreme Court held: "the amount of force required to kidnap an unresisting infant or child is simply the amount of physical force required to take and carry the child away a substantial distance *for an illegal purpose or with an illegal intent*." (*In re Michele D., supra,* 29 Cal.4th at p. 610, italics added; see also *People v. Oliver, supra,* 55 Cal.2d 761.) This illegal purpose or intent includes the intent to detain or conceal a child from the lawful custodian in violation of section 278.[7] (*People v. Jones* (2003) 108 Cal.App.4th 455, 465-467; see also *People v. Campos* (1982) 131 Cal.App.3d 894, 898-899.)

Defendant concedes the evidence was sufficient to support the solicitation conviction under the intent requirement articulated in *Michele D.* and *Oliver* but he claims the jury was only instructed on a forcible kidnapping theory. He argues this requires his conviction be reversed because the jury was not instructed to consider the *Michele D.* formulation of intent, and "a conviction cannot be affirmed by a reviewing

---

[6] An essential element of kidnapping, in its standard formulation, is that the victim's will must be overcome by the use of force or fear. (§ 207; *People v. Duran* (2001) 88 Cal.App.4th 1371, 1378.)

[7] Section 278 states: "Every person, not having a right to custody, who maliciously takes, entices away, keeps, withholds, or conceals any child *with the intent to detain or conceal that child from a lawful custodian* shall be punished by imprisonment in a county jail not exceeding one year, a fine not exceeding one thousand dollars ($1,000), or both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years, a fine not exceeding ten thousand dollars ($10,000), or both that fine and imprisonment. (Italics added.)

court on factual theories never tried before the jury."[8] Not so. Defendant was also convicted of attempted child abduction under section 278. The jury was instructed that to prove a violation of section 278 it had to find defendant acted "with the specific intent to detain or conceal the child from a lawful custodian."[9] (CALJIC No. 9.70.) The jury's conviction of defendant for attempted child abduction shows that it found beyond a reasonable doubt that defendant also possessed the requisite illegal intent for kidnapping. Accordingly, the failure by the trial court to instruct on the intent requirement for kidnapping as articulated in *Michele D.* and *Oliver* was harmless. "[W]e may affirm despite the error if the jury that rendered the verdict at issue could not rationally have found the omitted element unproven." (*People v. Sakarias* (2000) 22 Cal.4th 596, 625; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-325.)

IV. *The Court Did Not Abuse Its Discretion in Admitting Evidence*

Defendant contends the court abused its discretion when it admitted into evidence the items seized from his apartment to show that he had a sexual motive. The disputed items were the jackets of several books with themes involving sex between men and boys, the "triple x-rated" videos depicting sex between older and younger men, a sexual device, and "Libido Pills." "A trial court's exercise of discretion in admitting or excluding evidence . . . will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

---

[8] The court instructed the jury that "Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes or holds, detains or arrests another person and carries that person without his consent, compels another person without his consent and because of a reasonable apprehension of harm to move for a distance that is substantial in character is guilty of the crime of kidnapping, in violation of Penal Code section 207(a)."

[9] The jury was properly instructed that an attempt to commit a crime consists of a specific intent to commit the crime and a direct but ineffectual act done towards its commission.

A. *Relevance*

Defendant argues that evidence of adult sexual interests has no tendency to prove a sexual interest in children. The trial court reasonably reached a different conclusion. "Evidence is relevant if it has *any* tendency in reason to prove or disprove a disputed fact at issue." (*People v. Mayfield* (1997) 14 Cal.4th 668, 749.) The seized items could help prove that the offenses, despite defendant's advanced age and physical infirmities, were sexually motivated. His possession of books addressing sexual predation and child prostitution suggest an interest in the sexual exploitation of children. Another book that explained puberty to children was, in context, at least potentially suggestive of a sexual interest in children or an intent to engage the boy with conversation of a sexual nature. All of these items were relevant to the prosecutor's theory that defendant's motive in acquiring a boy with a "clean asshole" was sexual—and appear designed to undercut the theory that defendant had only a "beneficent intent" of raising an abandoned young child whose parents no longer wanted him. The court did not abuse its discretion when it admitted the seized items into evidence.

B. *Evidence Code Section 352*

Defendant alternatively contends these items should have been excluded under Evidence Code section 352 because their probative value was eclipsed by their potential for undue prejudice. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) We review the court's exercise of its discretion under well-settled principles.

Evidence is excluded under Evidence Code section 352 only when its probative value is "substantially outweighed" by the probability that its admission will create a substantial danger of undue prejudice or confusion. " 'Prejudice' as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent.

The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . ' "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " [Citation.]' [Citation.]

"The prejudice that section 352 ' "is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' [Citation.] In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009; *People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

Here, defendant argues the evidence was unduly prejudicial because it suggested he had a sexual motive for wanting a small boy. This, however, was precisely the point the evidence was introduced to prove. Although it may have damaged defendant's claim that his only motive was benevolence for an abandoned child, the harm to defendant's case flowed naturally from the relevant, probative evidence that he had a less salutary motive. Moreover, the trial court made clear that it would not permit anything "overtly prejudicial, lurid or exhibitionistic" to be displayed to the jury, e.g., that the seized videos would not be played and that the book covers did not include any sexually explicit images. The court did not abuse its broad discretion.

V. *The Attempted Hypnosis Does Not Warrant Remand*

Defendant also requests a limited remand to determine whether White was hypnotized before he testified against the defendant in 1981 and, if so, whether his testimony in this case was tainted by the hypnosis. We find no basis for remand.

A. *Background*

The day after White testified in this case, defense counsel told the court that she just learned White was hypnotized before defendant's trial for the White and Stayner kidnappings. Counsel moved for a mistrial or continuance based on this information. The prosecutor responded that there was no evidence the alleged hypnotism occurred; that White testified his current testimony was based on his independent recollection; that his testimony was offered only as other crimes evidence; and that it was corroborated by the testimony of Poorman and Stayner. The court denied a mistrial or continuance. It explained: "If in fact we were here to try Mr. Parnell on the kidnap of Timmy White you would have a point. However, his testimony was limited and specifically limited for a specific purpose. And therefore I find that your learning of his potentially being hypnotized before the 1981 testimony is farfetched and not dispositive on this issue. . . . [¶] This is somewhat farfetched and collateral information, and also based upon I believe probably triple hearsay."

Defendant moved for a new trial, in part, on the basis of the purported hypnosis. He argued that "it is evident that there were images, ideas, and words introduced to the child during this session. The person 'hypnotizing' young Mr. White was an investigator for the District Attorney's Office and NOT a licensed hypnotizer. At the time that Tim White testified in the original trial, the law in California was that hypnotized testimony was inadmissible." The trial court denied the motion.

B. *Analysis*

In *People v. Shirley* (1982) 31 Cal.3d 18, the key complaining witness was hypnotized for the prosecution on the eve of trial. (*Id.* at p. 23.) The trial court denied defendant's motion to prevent the witness from testifying, and the witness testified to several matters during trial that she had been unable to recall before. (*Id.* at pp. 29-30.)

The Supreme Court reversed on the basis that the use of hypnosis to restore the memory of a witness is not generally accepted as reliable by the relevant scientific community. The Court held that the "testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward." (*Id.* at pp. 66-67.) Here, however, defendant did not show that White was actually hypnotized. The investigator who is said to have attempted the hypnotism was not licensed. Nothing in the transcript of the White interview session establishes that he was hypnotized, defendant has not offered any other evidence to show that he was, and he concedes whether he was or not is not clear. Defendant has not shown that the White testimony should have been excluded.

Nor has defendant established grounds justifying a remand for further investigation. In effect, he asks us to second-guess the court's denial of his request for a continuance to allow him to review the issue and recall White for further testimony. A trial court has broad discretion to determine whether good cause exists to grant a continuance or to recall a witness. (*People v. Roldan* (2005) 35 Cal.4th 646, 670; Evid. Code, § 778.) Here, defendant provides nothing to suggest that further review or additional testimony from White would be exculpatory. Moreover, White's testimony was of limited importance, offered for a limited purpose under Evidence Code section 1101, subdivision (b) and corroborated by the testimony of Stayner and Poorman. There is no basis for a remand.

VI. *The Fines*

The trial court imposed a restitution fine of $15,000 under section 1202.4, subdivision (b)(1) and assessed and suspended an equivalent parole revocation fine under section 1202.45. Defendant contends, and the People correctly concede, that the fines are unauthorized because they exceed the $10,000 statutory maximum. (§§ 1202.4, subd. (b)(1), 1202.45; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.) We therefore modify the judgment by reducing the amount of each fine to $10,000, thereby reflecting the trial court's intent to impose the maximum fine.

DISPOSITION

The judgment is modified to reduce the amount of the restitution and parole revocation fines to $10,000 each. In all other respects the judgment is affirmed.

_____
Siggins, J.

We concur:

_____
McGuiness, P.J.

_____
Parrilli, J.