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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS LEONARDOS,

Defendant and Appellant.

A106914

(San Mateo County
Super. Ct. No. SC053745)

I. INTRODUCTION

A jury found appellant guilty of one misdemeanor count of annoying or molesting a child in violation of Penal Code section 647.6, subdivision (a)¹ (section 647.6(a)), and one misdemeanor count of child endangerment in violation of section 273a, subdivision (b). Appellant was sentenced to a 90-day county jail term and three years probation.

Appellant contends his conviction for annoying or molesting a child must be reversed because the jury may have based its verdict on a legally inadequate theory. He also challenges the sufficiency of the evidence to support his conviction for misdemeanor child endangerment. Although we reject appellant's first argument, we agree there is insufficient evidence to support the child endangerment conviction.

¹ All undesignated statutory references are to the Penal Code.

II. STATEMENT OF FACTS

Appellant was a teacher at Alta Loma Middle School in South San Francisco. Appellant's classroom was open to students both before and after school. During those times, students could come to him for homework help or to talk about life. Students at the school felt comfortable talking to him about their personal problems.

B., who was born in January 1989, attended Alta Loma for three years. When she was in seventh and eighth grade, B. was in appellant's yearbook class. B. also participated in appellant's ecology club which did recycling around campus.

In addition, B. babysat for appellant's two five-year-old children. B. frequently babysat for appellant during the summer between her seventh and eighth grade. Appellant, who drove B. to and from his home, paid B. \$10 per hour. While at appellant's home, B. played with the children, vacuumed and played pool. On one occasion late in the summer, B. saw a Smirnoff Ice alcoholic beverage in appellant's refrigerator and asked if she could drink it. Appellant said she could have that drink whenever she wanted. B. estimated that she drank Smirnoff beverages 10 times while at appellant's home during 2002. On occasion, when appellant drove B. home, he gave her gum to mask the smell of alcohol on her breath.

One day while she was at appellant's house, B. thought she smelled marijuana and asked if appellant had been smoking it. According to B., appellant replied, "you'll never catch me smoking it." Although initially refusing her requests, appellant eventually agreed to smoke marijuana with B. and told her she really had to care about him and trust him because he could get into lots of trouble for letting her smoke. B. estimated that she and appellant smoked marijuana together between four and 10 times.

On one occasion, when appellant and B. were playing pool together, appellant asked if B. had ever played "strip pool." Another time, appellant turned the television on to the Playboy Channel while he and B. were playing pool together. A naked woman was reporting the weather.

During the fall of her eighth grade year, B. spent a great deal of time in appellant's classroom before school, during lunch and after school. While in the classroom during

these times, appellant and B. often engaged in crude banter. They made comments like “lick my clit,” and “suck my dick.”

On November 22, 2002, B. told her mother she was going to do some recycling with appellant. Instead, they went to appellant’s home to “hang out.” B. and appellant played pool, drank Smirnoff Ice, and smoked marijuana. Before appellant’s wife and children arrived home, they went to the beach, watched the sunset and went for a drive. According to B., appellant asked, “you want to jump my bones as much as I want to jump yours?” B. laughed. Before he dropped B. off at a racquetball club where she was supposed to meet her mother, appellant said “I can’t believe I’m about to have an affair with a 13-year-old.” B. laughed. As she got out of the car, B. kissed appellant on the check. Appellant pointed to a wet spot on his pants and said, “look what you made me do.”

The next evening, November 23, 2002, B. told her mother she was going to the movies with a friend name Cheryl. Instead, she called appellant and arranged to meet him at a nearby park. The two drove around, talked and smoked marijuana. At some point B. pretended to be asleep because she suspected appellant was attracted to her and wanted to see what he would do. B. later recalled that appellant said “I got to be good; I have a wife and kids; I just got to be good.” At some point, appellant stopped the car, tried to wake B. and asked “can I touch you?” He tickled her and touched her upper chest area. Then appellant called his wife who told him that B.’s mother was trying to locate her. Appellant took B. back to the park and told her to tell her mother that she had come home early because she and Cheryl had a fight at the movies. When B. arrived at home, her mother called the police.

Two police officers interviewed appellant on the evening of November 23, 2002.² Appellant told police B. called him at around 5:30 that afternoon. She was despondent or upset about something and asked if he wanted to talk. Appellant agreed and arranged to

² The interview was videotaped without appellant’s knowledge. The videotape was introduced into evidence at appellant’s trial.

pick her up at a park near her house. They talked about life in general, her homework and about her mother who was “on her case.” Appellant said he dropped B. off about 45 or 50 minutes later at the park where he had picked her up.

Appellant told the police he had recently been in a serious cycling accident and broke several bones and needed help around his house. B. had been babysitting once or twice a week since September. Appellant said he also spent time with B. before school and at lunch when students were free to come to his classroom to talk about life.

An officer told appellant that B. said she and appellant had a “relationship.” Appellant responded their relationship was between teacher and student but then acknowledged that B. may have been infatuated with him. He acknowledged that he acted like a friend to kids and that he let kids, including B. “talk trash to him,” and make comments like “suck my dick,” and “screw you.” The officers suggested that B. thought she was appellant’s girlfriend because B. had kissed appellant, put her arm around him and that there had been touching. Appellant responded that he let kids jump on his back so there was physical contact but “not like groping or something like that.” Appellant acknowledged that B. may have misconstrued things and said the officer had taught him a lesson.

Appellant became nervous and upset during the interview. He recognized, in hindsight, that “I’m too personable and I talk to the kids when they ask me for advice.” He said he was wrong to have a personal conversation with B. at night for 45 minutes when he knew her mother wanted her to be accountable for her time.

Appellant agreed to give a semen and saliva sample. When asked if he would also give a handprint sample, appellant explained that he had touched B. when he helped her out of his car because she had fallen asleep in the back seat. He said that his handprints could be on her shoulder, chest and stomach area. Appellant also said that B. may have kissed him on the cheek. Appellant said he wanted to apologize to B.’s mother. The officer suggested he write her a letter because she was too upset to talk.

During a break from the police interview, appellant wrote a letter to B.’s mother. He apologized for not asking permission before talking with her daughter about life, and

for picking her up at the park and for the fact that she did not know where her daughter was. Appellant also apologized if B. was misled in any way and if she thought their relationship was anything other than friends and student-teacher. Near the end of the letter, appellant said: “B. I am sorry that if [sic] I misle[d] you but I was here as a friend. I should have been a teacher and we should only talk in supervised school setting.”

A different police officer interviewed appellant on November 25, 2002.³ Appellant said that he and B. had a good student-teacher relationship. They also had common interests including basketball and teachers they both disliked. He realized in retrospect that B. had a crush on him. His relationship with B. was stronger than his relationship with other students because she babysat for him, he trusted her with his kids, and she was very charismatic. Appellant also said that he was like a big brother or father figure for B. whose mother beat her and who needed someone to talk to.

The officer told appellant that B. had given a detailed account of her car ride with appellant on the previous Saturday evening. When told that B. reported that appellant touched her breasts, appellant responded that he probably had when he grabbed her to get her out of the car and that “I shouldn’t have.” The officer said B. reported that appellant asked if he could touch her. Appellant explained: “I said to her I have got to touch you to get you out of the car.”

Appellant also admitted that, during the car ride, he said “I have to be good, I have to be good.” Appellant explained that he made that statement because it was starting to dawn on him that B. liked him. Appellant also knew from prior conversations that B. had been molested by another teacher. In light of these facts, appellant realized and was telling B. that they were going to have to stop playing a game that she liked to play with him. The game involved hitting each other’s arm either as hard or as soft as they could.

Appellant acknowledged that he and B. had a serious discussion the day before the Saturday evening car ride. While the two were working on a recycling project together,

³ This interview was also videotaped without appellant’s knowledge and a copy of the tape was introduced into evidence at trial.

they talked about the fact that B. had an attraction for appellant. Appellant recalled telling B. she was “an attractive young lady, but it can’t go on” and that “[w]e have to be good.” Appellant explained that even though B. said she liked him, he did not really understand that there was an infatuation until after his first police interview.

Appellant acknowledged that B. is a very attractive girl and that she looks older than her 13 years; he also admitted that they spent time together, had common interests and that “we click.” Appellant characterized his discussion with B. about their mutual attraction as inappropriate because he had a “cavalier attitude toward it” and he “joked too much.” He was leading her on, letting her think he was attracted to her. Later in the interview, appellant admitted that he was attracted by B.’s charismatic personality which he likened to O.J. Simpson and characterized as very likeable. Appellant also conceded that, if he was B.’s age, he would have “no problem” accepting an invitation to have sex with her.

At one point during this second interview, the following exchange occurred:

“[Officer]: But as you build this relationship and this attraction how hard do you think it would be to resist her if she wanted to move a little farther?”

“[Appellant]: If she came on to me?”

“[Officer]: Exactly. How hard do you think that would be Nick?”

“[Appellant]: Honestly?”

“[Officer]: Yes honestly.

“[Appellant]: I’m glad the police called up.”

Appellant admitted that he had said inappropriate things to B., that she called him honey and he called her darling and that when she made sexual remarks to him, he made them right back to her. When asked for an example of inappropriate sexual remarks that the two made, appellant said B. would say “lick my clit” and he would respond, “you got the time, I got the place.” Appellant told the officer that, as he looked back on things that had happened, he realized and acknowledged that this type of behavior was inappropriate and wrong.

On May 2, 2003, appellant was charged with one count of committing a lewd and lascivious act on a child under the age of 14 (§ 288, subd. (a)), and one count of annoying or molesting a child (§ 647.6(a)). On September 2, 2003, a second case was filed charging appellant with five counts of providing marijuana to a child under the age of 14 (Health & Saf. Code, § 11361, subd. (a)), one count of contributing to the delinquency of a minor (§ 272, subd. (a)(1)), and one count of child endangerment (§ 273a, subdivision (b)).

The two cases against appellant were consolidated and tried together before a jury who rendered its verdict on November 5, 2003. Appellant was convicted of one count of annoying or molesting a child and one count of child endangerment, both misdemeanors. The jury was unable to reach a verdict as to the remaining charges which were eventually dismissed.

III. DISCUSSION

A. *Annoying or Molesting*

Appellant argues his conviction for annoying or molesting a child must be reversed because the instructions allowed the jury to base a conviction on several “legally inadequate” theories that the prosecutor presented at trial.⁴ (Citing *People v. Guiton* (1993) 4 Cal.4th 1116.)

When appellant raised this issue in his new trial motion, the trial court found that the prosecutor’s theory at trial was that appellant engaged in a course of conduct with B. which violated section 647.6(a) and that the evidence supported a conviction based on that theory. Appellant disputes this finding; he contends that the prosecutor belatedly

⁴ As our analysis of this issue illustrates, it is not necessary to address the various theories that Leonardos attributes to the prosecutor and then challenges as legally inadequate. We are compelled, however, to remind Leonardos’s counsel of the impropriety of his claim, during oral argument before this court, that one of these alleged prosecutorial theories implicated Leonardos’s First Amendment rights. As counsel well knows, this claim was not raised in his appellate briefs or in the lower court.

articulated his continuous course of conduct theory for the first time in opposition to the new trial motion. The record belies this assertion.

In his closing argument, the prosecutor described the charge at issue as follows: “Count 2 is a misdemeanor charge. It is called annoy or molesting of person under the age of 18, and it is essentially *for all the conduct* that led up to Saturday night. I will tell you the instructions what I have to prove in a moment. But I basically have to show that he had an unnatural sexual interest in a person under the age of 18. And by that, you would be talking about the comments in class, the strip pool, the Playboy Channel, the do you want to jump my bones like I want to jump yours, I can’t believe I’m about to have an affair with a 13-year-old, letting her kiss him, *all that stuff.*” (Emphasis supplied.)

As this passage from the prosecutor’s argument demonstrates, the People’s theory clearly was that appellant engaged in a course of conduct with B. over a period of several months which constituted a violation of section 647.6(a). Indeed, appellant has not cited anything in this record which even suggests that anyone who participated in this trial viewed the charge at issue as something other than a continuous course of conduct charge.

Appellant contends that his conviction cannot be sustained by evidence of a course of conduct because the jury was given the following instruction regarding unanimity:

“Defendant is accused in Count 2 of having committed various crimes in violation of . . . Section 647.6(a) of the Penal Code on or about March 1st, 2002, through November 23rd, 2002. In order to find the Defendant guilty, it is necessary for the Prosecution to prove beyond a reasonable doubt the commission of a specific act or acts constituting that crime within the period alleged. [¶] In order to find the Defendant guilty, you must unanimously agree upon the commission of the same specific act or acts constituting the crime within the period alleged. It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.”

Construing this unanimity instruction as requiring the jury to base its conviction on a single act, appellant argues that, because some of the acts alleged were not criminal, his conviction cannot stand. The most obvious problem with this argument is that

appellant misconstrues the instruction that was given. The jury was instructed to unanimously agree on the “commission of the same specific act *or acts constituting the crime within the period alleged.*” (Emphasis added.) This instruction simply did not require that the jury unanimously agree that appellant violated section 647.6(a) by committing only one of the many acts appellant was accused of committing.

Furthermore, appellant’s argument is based on the incorrect premise that each of the acts that the People identified as supportive of this charge constituted a separate theory of liability. As discussed above, the prosecutor’s sole theory of liability was that appellant engaged in a course of conduct prior to the Saturday night car ride with B. which constituted a violation of section 647.6(a). Indeed, appellant was put on notice of this theory in the charging allegation in the information that was filed against him on May 2, 2003, which stated that “[o]n and between 3/01/2002 and 11/23/2002, [appellant] did willfully and unlawfully annoy or molest a child” (Emphasis supplied.)

The prosecutor’s course of conduct theory was also expressly reflected in and consistent with the instruction to the jury regarding the elements of a section 647.6(a) offense, which stated, in part: “In order to prove this crime, each of the following elements must be proved: [¶] 1. A person engaged in *acts or conduct* directed at a child under the age of 18 years which would unhesitatingly disturb or irritate a normal person if directed at that person; and [¶] 2. The *acts or conduct* were motivated by an unnatural or abnormal sexual interest in B. the alleged child victim. [¶] It is not necessary that the *acts or conduct* actually disturb or irritate the child or that the body of the child be actually touched.”⁵ (Emphasis added.) When read together, this instruction and the unanimity instruction accurately advised the jury that the annoy or molest charge was based on evidence of a series of acts, i.e. a continuous course of conduct.

Appellant contends that this case was not susceptible to a continuous course of conduct theory as a matter of law. We disagree. “[B]y definition the offense of child

⁵ Appellant does not dispute that this instruction correctly states the elements of the “annoy or molest” charge. (See *People v. Lopez* (1998) 19 Cal.4th 282, 289.)

annoyance or molestation may . . . be committed by a single act or a repetitive course of conduct.” (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1015.) Here, the People alleged and offered evidence to prove that appellant engaged in a repetitive course of conduct which constituted a violation of section 647.6(a).

In light of the fact that the People’s theory with respect to this charge was that appellant violated the law by engaging in a continuing course of conduct during a specified period of time, there is a question as to whether an unanimity instruction should have been given at all. (See *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309; see also *People v. Whitham* (1995) 38 Cal.App.4th 1282, 1296-1297.) However, the instruction that was given in this case did not, as appellant maintains, have the effect of parsing the prosecutor’s course of conduct theory into several separate and comparatively weak theories of liability. Indeed, the most likely consequence of giving this instruction was that the jury believed it had to unanimously agree as to every act constituting the course of conduct which violated this statute. In other words, if giving the unanimity instruction was error, appellant undoubtedly benefited from it.

We underscore the fact that appellant does not challenge the sufficiency of the evidence to support this conviction. Nor could he reasonably do so. Instead, appellant mischaracterizes the prosecutor’s case as consisting of several alternative theories of liability each supported by evidence of an isolated act allegedly committed during the relevant period. Without much difficulty, appellant can then argue that one such act, when viewed in isolation, is “legally inadequate” to support the conviction. We are simply not persuaded by this creative circumvention of the substantial evidence rule.

B. *Child Endangerment*

Appellant challenges the sufficiency of the evidence to support his conviction for violating section 273a, subdivision (b), misdemeanor child endangerment.

“The criminal acts proscribed by both the felony and misdemeanor subdivisions of section 273a are (1) willfully inflicting or causing or permitting a child to suffer unjustifiable physical pain or mental suffering, (2) willfully causing the person or health of a child under one’s care or custody to be injured, and (3) willfully placing a child

under one's care or custody in a situation where its person or health may be endangered. If the act is done under circumstances or conditions likely to produce great bodily injury or death, it is a felony; if not, the same proscribed act is a misdemeanor." (*People v. Deskin* (1992) 10 Cal.App.4th 1397, 1401.)

Different mental states are required for the distinct types of conduct prohibited by section 273a. (*People v. Valdez* (2002) 27 Cal.4th 778, 789.) When the offense is committed by infliction of direct abuse, a general intent mens rea applies. However, in cases of indirect abuse, such as placing a child in a dangerous situation, criminal negligence must be shown. (*Id.* at pp. 789-792; *People v. Deskin, supra*, 10 Cal.App.4th at p. 1402.) "Criminal negligence as applied to section 273a means 'the defendant's conduct must amount to a reckless, gross or culpable departure from the ordinary standard of due care; it must reach such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life.'" [Citation.] (*People v. Deskin, supra*, 10 Cal.App.4th at p. 1402.)

In the present case, the child endangerment charge against appellant was based on allegations that he left his five-year-old twins home alone while he went to pick up B. for a babysitting job and thereby placed the children in a situation where their health was endangered. The only evidence offered in support of the charge was B.'s trial testimony.

B. testified that appellant picked her up at her house so she could baby-sit and, when they arrived at appellant's house, his children "were by themselves." B. testified that the drive between her home and appellant's house was five to ten minutes long⁶, and that the children were in the kitchen or in the living room when she and appellant arrived at appellant's home. B. could not recall when this incident happened or what the children were doing when they arrived at the house. She did not know where appellant's wife was during the relevant time period. Nor did she ever have a discussion with appellant about

⁶ Other evidence established that the distance between appellant's home and B.'s house was 8.1 miles.

the fact that the children were alone. When asked how many times B. arrived at appellant's house to find the children alone, she testified "[a]bout twice."

Appellant contends this testimony does not constitute substantial evidence of child endangerment. We agree for at least two reasons. First, there is insufficient evidence that appellant placed his children in the allegedly dangerous situation by leaving them alone in the house. B. did not testify that appellant left the children alone in the house but only that the children were alone when she and appellant arrived. Further, B. conceded that she did not know where appellant's wife was during the relevant time period. Appellant's wife could have been in another part of the house, she could have stepped outside for a few minutes, she could have gone next door to borrow a cup of sugar, or she may even have made the unreasonable decision to leave the children alone in the house. All of these scenarios are at least as plausible as the prosecutor's theory because there simply was no evidence that appellant left his kids alone.

The second problem with the state of the evidence relating to this charge is that there is insufficient evidence to sustain a finding that appellant was criminally negligent. Indeed, the record is void of evidence regarding the circumstances under which the children were left alone. Even if we assume that the children's mother was not in the house or somewhere very close by, we do not know who left the children alone, why they were alone, how long they were alone, or anything about the place in the home where they were left. Indeed, B. could not even recall where the children were when she arrived at the house.

Under these circumstances, we find the record before us does not contain substantial evidence to support the misdemeanor child endangerment conviction.

IV. DISPOSITION

The conviction for annoying or molesting a child is affirmed but the conviction for misdemeanor child endangerment is reversed. This case is remanded to the trial court for further proceedings consistent with this opinion.

Haerle, Acting P.J.

We concur:

Lambden, J.

Ruvolo, J.