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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JAMES DANIEL DEAN, Defendant and Appellant.	C056044 (Super.Ct.No. 022721)

Defendant James Daniel Dean was convicted by jury of committing lewd conduct with a child under age 14 (Pen. Code, § 288, subd. (a)), unlawful intercourse by a person 21 years of age or older with a minor under 16 years of age (Pen. Code, § 261.5, subd. (d)), child procurement (Pen. Code, § 266j), witness dissuasion (Pen. Code, § 136.1, subd. (b)(1)), and violation of a court order (Pen. Code, § 166, subd. (a)(4); further section references are to the Penal Code).

Sentenced to state prison for 12 years, defendant correctly contends his conviction for child procurement must be reversed

due to instructional error and for lack of substantial evidence to support it. He also argues his conviction for witness dissuasion must be reversed because the trial court failed to instruct the jury on an element of the offense, and he is entitled to one more day of presentence custody credit.

As we will explain, the trial court erred when instructing the jury on the crimes of child procurement and witness dissuasion; the conviction for child procurement must be reversed due to the instructional error and because the evidence does not satisfy one of the elements of the crime; defendant was not prejudiced by the instructional error regarding witness dissuasion; and, on remand, the trial court can address the issue of sentencing credits.

FACTS

Because defendant challenges only his convictions for child procurement and witness dissuasion, we limit the statement of facts to those offenses.

The victim, T.B., was 13 years old when defendant, who was 43 years old, first molested her. Defendant was a long-haul truck driver who lived with T.B.'s biological parents in Oregon. T.B. became infatuated with defendant and, in January 2000, accompanied him on a trip in his 18-wheel truck to make a delivery in Portland. On the way, defendant stopped at a rest stop and repeatedly asked T.B. to have sex with him. When she refused, he forcibly raped her. Defendant told her not to tell anyone or she would get into trouble; fearful, she complied with his demand.

Notwithstanding the rape, T.B. continued to have a romantic interest in defendant. In March 2000, he invited her to go with

him to Medford. Instead of stopping in Medford, he drove his truck to California, telling T.B. they were going to Fairfield.

While in California, defendant stopped and asked T.B. to orally copulate him. When she refused, he physically forced her to do so. After defendant conducted business in Fairfield, they drove north and stopped in a rest area in Dunnigan. There, defendant asked T.B. to have sex with him. When she refused, he forcibly raped her. They returned to Oregon, but T.B. did not report the assaults because defendant had again told her she would get into trouble if she did so.

Defendant did not testify. His defense, presented through other witnesses, was that T.B. was not telling the truth because she was infatuated with him, and she was jealous of his fiancée.

DISCUSSION

I

Section 266j defines what is sometimes called child procurement: "Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in Section 288, or who causes, induces, or persuades a child under the age of 16 to engage in such an act with another person, is guilty of a felony . . . ."

The standard instruction used for a violation of section 266j is CALCRIM No. 1152, which states in pertinent part: "The defendant is charged . . . with (providing/causing) a child to engage in a lewd or lascivious act [in violation of Penal Code section 266j].

[¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] *<Alternative 1A -- gave/transported a child>* [¶] [1. The defendant intentionally (gave/transported/provided/made available) a child to someone else so the person could engage in a lewd or lascivious act with that child;] [¶] *<Alternative 1B -- offered to give/transport a child>* [¶] [1. The defendant offered to (give/transport/provide/make available) a child to someone else so the person could engage in a lewd or lascivious act with that child;] [¶] *<Alternative 1C -- caused child to engage in>* [¶] [1. The defendant (caused/persuaded/ induced) a child to engage in a lewd or lascivious act with someone else;] [¶] [AND] [¶] 2. When the defendant acted, the child was under the age of 16 years[.] [¶] . . . ."

The trial court did not use CALCRIM No. 1152. Instead, the court instructed the jury as follows: "The defendant is charged in Count 12 with transporting a child for a lewd or lascivious act. To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant willfully transported another person, [that] person was a child under the age of 16 years, and the person was transported for the purpose of committing any lewd or lascivious [] act as defined in Section 288. The defendant is charged with a Section 288 crime in Count 6."

The court's instruction omitted the critical and obvious element that the procurement of the child by any of the specified means must be for the purpose of the child committing a lewd and lascivious act with "someone else," i.e., with an individual other than the person who provides the child.

Aside from the instructional error, defendant's conviction for violating section 266j must be reversed, and the prosecutor cannot retry him on that charge, because there is no evidence that defendant provided the victim to another person for the purpose of committing a lewd and lascivious act.

The People disagree, arguing that the statute must be read as making it a crime for a person to transport or provide a child for the purpose of *any* lewd or lascivious act, including one only for that person's own sexual gratification. This is so, the People argue, for two reasons: First, the initial words of section 266j ("[a]ny person who intentionally gives, transports, provides, or makes available [a child under the age of 16 for the purpose of any lewd or lascivious act]") do not end with the phrase "to another person," as do the words that follow ("or who offers to give, transport, provide, or make available [such a child for such an act]"). Second, "from a [public] policy standpoint, [the People's] interpretation makes sense."

Their interpretation runs afoul of the principle that the words of a statute cannot be read "in isolation, ignoring their context." (*People v. Carter* (1996) 48 Cal.App.4th 1536, 1540.) "We must read [the words of] a statute as a whole and attempt to harmonize its elements by considering each clause or section in the context of the overall statutory framework. [Citation.] We are obligated to select the construction that comports most closely with the apparent intent of the Legislature . . . . [Citation.]" (*Ibid.*)

Applying this principle to section 266j, it is obvious that the words "to another person" modify both the first phrase "[a]ny person

who intentionally gives, transports, provides, or makes available [a child under the age of 16 for the purpose of any lewd or lascivious act]" and the second phrase "or who offers to give, transport, provide, or make available" such a child for such an act.

In support of their contrary interpretation, the People quote the 1981 Legislative Counsel's Digest summary for Senate Bill No. 776 which states: "[Section 266j] would [also] make it a felony to give, transport, provide, or make available a child . . . for the purpose of any lewd or lascivious act[.]" (Legis. Counsel's Dig., Sen. Bill No. 776 (1981-1982 Reg. Sess.) Summary Dig., p. 332.)

This shorthand summary, a general reference to the subject matter of the section, does not reflect a legislative intent to apply section 266j as the People argue. More complete descriptions of the statute in various committee analyses demonstrate an intent consistent with a commonsense reading of its words. For example, the Senate Committee on Judiciary stated the statute "would punish . . . the giving, transporting, providing, or making available (or offering to do so) to another, for the purpose of lewd conduct, any child" (Sen. Com. on Judiciary, Unlawful Sexual Conduct--Penalties, Analysis of Sen. Bill No. 776 (1981-1982 Reg. Sess.) as amended May 13, 1981), and the Assembly Committee on Criminal Justice described the statute as "mak[ing] it a felony to intentionally give, transport or make available a child . . . . to another person for the purpose of a lewd and lascivious act . . . ." (Assem. Com. on Criminal Justice, Analysis of Sen. Bill No. 776 (1981-1982 Reg. Sess.) as amended July 6, 1981.)

Thus, the legislative history of section 266j supports, rather than contradicts, our interpretation of the statute. Accordingly, we must reverse defendant's conviction for violating this statute.

II

Defendant's conviction for dissuading a witness, a violation of section 136.1, subdivision (b)(1), was based upon his statements to T.B. following the sexual assault at the Dunnigan rest stop.

Section 136.1, subdivision (b)(1) provides in pertinent part: "[E]very person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense . . . . [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge."

The standard instruction used for a violation of section 136.1, subdivision (b)(1) is CALCRIM No. 2622, which states in pertinent part: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] . . . [¶] *<Alternative 1B – report of victimization>* [¶] [1. The defendant [maliciously] (tried to (prevent/[or] discourage)/(prevented/[or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from making a report that (he/she/someone else) was a victim of a crime to ____ *<insert type of official specified in Pen. Code, § 136.1(b)(1)>*[.]"

Once again, the trial court did not adhere to the standard instruction. Instead, the court instructed the jury as follows:

"The defendant is charged in Count 11 with dissuading a witness. To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant maliciously tried to prevent or discourage [T.B.] from reporting a crime; [¶] Two, [T.B.] was a crime victim; and [¶] Three, the defendant knew he was preventing or discouraging [T.B.] from reporting a crime and intended to do so."

Defendant contends the conviction must be reversed because the trial court erred when it failed to instruct the jury that to convict him for this offense, the People must prove an element of the offense--specifically, that defendant had dissuaded T.B. from reporting the assault to one of the officers or officials designated in section 136.1, subdivision (b)(1).

The People in effect concede the omission was error, but they argue it was harmless.

We agree the trial court erred. (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1320 [the type of official specified in section 136.1, subdivision (b)(1) is an element of the offense].)

A trial court's omission of an element of an offense is error of constitutional dimension and, thus, is subject to review under the harmless beyond a reasonable doubt standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].) We "may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue." (*People v. Sakarias* (2000) 22 Cal.4th 596, 625.)

Here, T.B. testified that, after defendant forcibly raped her at the Dunnigan rest stop, he told her "not to tell anybody";

otherwise, she "would be the one [who] got in trouble." Likewise, when defendant previously raped T.B. in Oregon, he told her "not to tell anybody else" or she would get in trouble. "[T]errified" by what defendant told her, T.B. did not report the Oregon rape. She did not report the Dunnigan rape because she "was only thirteen years old" and believed what defendant had said.

In defendant's view, if the proper instruction had been given, "a jury might not have been convinced beyond a reasonable doubt that [he] intended to dissuade [T.B.] from reporting the crime to the authorities, since, assuming the prosecution evidence to be true, [defendant's] concern was to avoid the discovery of his misconduct by her family so that he could continue to engage in sexual relations with her. He could be alone with her in his truck a significant distance from their Oregon neighborhood, only if he obtained the family's consent and that would not occur if anyone of them suspected any sort of indiscretion between the pair."

The argument is unrealistic, and it is a theory that defendant did not present to the jury at trial. Thus, had the jurors been told of the element omitted from the instruction that was given to them by the trial court, it is inconceivable they would have concluded that defendant's statement was intended *only* to dissuade T.B. from telling her parents (so they would continue to allow her to accompany him on some of his journeys) and not to dissuade her from ultimately reporting the rapes to law enforcement (a consequence that would be far more devastating to him in that it could lead to his prosecution, conviction, and incarceration for a lengthy term in state prison).

Therefore, we are convinced beyond a reasonable doubt that the instructional error on this issue was harmless.

III

Because we must reverse defendant's conviction for violating section 266j, and remand to the trial court for resentencing, we need not address defendant's argument that he is entitled to an additional day of presentence custody credit -- an issue which can be addressed by the trial court on remand.

DISPOSITION

The conviction and sentence for violation of section 266j are reversed. The case is remanded to the trial court for resentencing.

SCOTLAND, P. J.

I concur:

HULL, J.

I concur fully in the opinion but write separately to emphasize that when trial judges tinker with approved CALCRIM instructions, they may be acting foolishly and risking reversal of the entire judgment.

ROBIE, J.