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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL M. ALLEN, Defendant and Appellant.	B250775 (Los Angeles County Super. Ct. No. MA056609)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Walgren, Judge. Affirmed in part, reversed in part and remanded.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Gabriel Allen was convicted by a jury of one count of committing a lewd and lascivious act upon Frances P., a child under the age of 14 (count 1, Pen. Code, § 288 subd. (a)[1]); three misdemeanor counts of unauthorized invasion of privacy against Frances P., Patience P., and Tara P. (counts 2, 3, and 4, § 647, subd. (j)(3)); two misdemeanor counts of sexual exploitation of a child (counts 5 and 7, § 311.3, subd. (a)); and one count of felony possession of matter depicting a minor engaging in sexual conduct (count 6, § 311.11, subd. (a)). He was sentenced to eight years in prison for count 1, and five years in any penal institution for counts 2 through 6. He appeals, contending there was insufficient evidence presented at the preliminary hearing to support the allegations in counts 5 and 7; there was insufficient evidence to support the convictions of counts 3, 5, 6 and 7; his attorney and the prosecutor misled him about the maximum possible prison term leading him to reject the prosecutor's plea offer; and he was improperly sentenced to consecutive terms for counts 2, 3, 5 and 7. We affirm the judgment in part, reverse in part, and remand for resentencing.

FACTUAL & PROCEDURAL BACKGROUND

Tara P. began dating appellant in 2011. Tara's daughter, Frances, was 10 years old at the time. Tara moved in with appellant. Tara left Frances in appellant's care when she was briefly incarcerated and again when she had surgery. Sometime during those periods, appellant put his hands in Frances's pants and touched her vaginal area. In April 2012, Tara went to the Los Angeles County sheriff's station in Antelope Valley with a flash drive containing videos she had taken from appellant's laptop. The videos depicted Frances naked, using the toilet, with views of her vagina. Other videos showed seven-year-old Serenity P. and nine-year-old Patience P., Frances's cousins, naked and using the toilet. Tara P. was also filmed while she was naked.

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[1] All subsequent undesignated statutory references shall be to the Penal Code.

Detective Susan Velazquez watched the videos. She then interviewed Frances who initially denied appellant had touched her inappropriately, but later admitted appellant had touched her. The principal at Frances's school talked to Frances and opined that she was being truthful. Appellant was arrested and initially charged with one felony count of committing lewd and lascivious conduct and three misdemeanor counts of invasion of privacy (counts 2, 3, and 4).

The preliminary hearing

At the preliminary hearing, Detective Velazquez testified that she interviewed both Tara and Frances. Tara told her how she had discovered the videos on appellant's computer. Detective Velazquez recovered eight videos. The videos showed images of appellant sitting in the bathroom, watching something on another computer as he undressed and touched himself. There were images of Tara, Frances and Patience using the bathroom and changing clothes. Tara identified the bathroom of appellant's residence as shown on the videos. Tara told the detective she had never given him permission to record her or Frances. Detective Velazquez also interviewed Frances. Frances told her that during one of the times she was living alone with appellant, he had put his hand inside her pants and touched her vaginal area. Detective Velazquez said Frances was reluctant to tell her anything but it was clear she was not telling the truth. In a second conversation, Frances was crying and admitted she had not told the truth, but she was afraid. Frances told her it happened when her mother was in jail.

The videos were not admitted into evidence at the preliminary hearing.

The court held there was sufficient cause to believe that the following crimes were committed: one count of section 288, subdivision (a) and three misdemeanor violations of section 647, subdivision (j)(3).

An amended information was filed July 15, 2013 adding counts 5 through 12, alleging four counts of sexual exploitation of a child (§ 311.3) and four counts of possession of matter depicting a minor engaged in sexual conduct (§ 311.11, subd. (a)).

Defense counsel moved to dismiss those eight counts pursuant to section 995. The court granted the motion as to counts 9 through 12.

Trial testimony

At trial, Tara testified that while they were living together, appellant was constantly viewing pornography on his computer and often recorded himself on the computer's web camera while he was using the bathroom.

In September 2011, after she had moved in with appellant, Tara was incarcerated briefly. Appellant cared for Frances during that time. In March 2012, Tara went to the hospital to have surgery and again left Frances in appellant's care. Tara noticed that appellant acted differently towards her after she was released from jail. He was distant and Tara thought he was seeing someone else.

In March 2012, Tara and Frances walked into the bathroom while appellant was sitting on the toilet with his penis hanging out of his shorts. Tara called him a pervert and he kicked Tara and Frances out of the residence.

In April 2012, Tara went to visit Tiffany, her former sister-in-law. Tiffany had two young daughters, Patience and Serenity. Appellant was at Tiffany's house when they arrived. He later fell asleep and Tara used his laptop computer. She opened a folder entitled "My Videos" or "My Movies," and found approximately 16 videos. She watched two videos, which showed Frances and Patience using the toilet or changing clothes in appellant's bathroom. Tara copied the videos on to a flash drive. In some of the videos, appellant was seen setting up a camera in the bathroom, turning it on, and then showed him naked and masturbating. One of the videos showed him viewing pictures of young girls on his laptop. One of the videos contained images of Frances's vagina and appeared to be edited and spliced. Later that day, Tara asked Frances if appellant had touched her. Frances only said that appellant had touched her "butt" by accident when he was sleeping. Tara did not feel Frances was being forthright and took the flash drive to the sheriff's station the following day.

Tara testified that as far as she knew, no recording device was visible in the bathroom. Tara did not think appellant had a functioning camera. She believed appellant used his cellphone to record the videos.

Frances testified that appellant had touched her while they were in his apartment together.

The principal at Frances's school testified that Frances told her appellant had touched her in the crotch.

Detective Velazquez testified about receiving the flash drive from Tara and watching the videos. She confirmed Patience's birthday.

Appellant did not present any evidence in his defense.

The plea deal

Prior to the start of the preliminary hearing, appellant was offered a plea bargain in which he would plead guilty to count one in exchange for a mid-term sentence of six years and all the other charges would be dismissed. The court advised appellant that his maximum prison time would be up to eight years "on count one alone." Appellant rejected the offer. Subsequently, the information was amended to add counts 5 through 12.

On July 16, 2013, the defense moved to dismiss counts 5 through 12 pursuant to section 995. The prosecution then offered appellant a five-year sentence in exchange for pleading guilty or no contest to counts 6, 8, 10 and 12, with the remaining counts to be dismissed. Defense counsel advised appellant that as charged, there could be over 10 years of potential prison time. Appellant rejected the offer. The court then granted the section 995 motion as to counts 9 through 12, and denied it as to counts 5 through 8. Both attorneys calculated appellant's maximum prison exposure on the remaining counts as 10 years, six months. When questioned by the court, appellant said he did not wish to make a counteroffer.

Jury selection began on July 17, 2013. The following day, the prosecution offered appellant a sentence of three years in exchange for a guilty plea to count one. The court

indicated that appellant had initially stated he would accept the offer, but had changed his mind. Both attorneys again represented the maximum exposure to prison was 10 years, six months. Defense counsel indicated he advised appellant to take the offer but appellant had rejected it. Appellant then personally told the court he rejected the offer.

At the sentencing hearing, the prosecutor argued for the imposition of a maximum sentence of 13 years, 8 months. Defense counsel argued appellant's sentence should be limited to 10 years, 6 months based upon prior representations.

The court stated: "As far as any pretrial negotiations, obviously this court was not a party to those. This court was present when calculations were being made as to what the maximum exposure was. Obviously that changed. The 995 motion was granted. Different calculations were put forth by both sides. I will note, though, however, at a time when the court had been advised the defendant was willing to accept the People's offer, he was brought out to this court, and the court began to take a plea. The defendant then stopped the process and said *he was not going to because he didn't do the crime*. And I'm paraphrasing, but it was not based on any statements regarding his maximum exposure or anything like that. He simply said he wasn't going to do it because he did not do the crime." (Italics added.)

Sentencing

The court sentenced appellant to the high term of eight years on count 1. It then imposed consecutive sentences of one year each for counts 2, 3, 4, and 5, and an additional one year consecutive term for count 7. It imposed a consecutive term of eight months for count 6, but stayed it pursuant to section 654.

DISCUSSION

1. *Sufficiency of evidence at the preliminary hearing*

Following Detective Velazquez's testimony at the preliminary hearing on April 24, 2013, the District Attorney filed an information charging appellant with four counts, one under section 288, subdivision (a), and three misdemeanor counts under section 647

subdivision (j)(3). On July 15, 2013, the trial court allowed the prosecution to amend the information to add counts 5 through 12, four counts of section 311.3, and four counts pursuant to section 311.11. Appellant entered a plea of not guilty to the amended information.

The following day, defense counsel made an oral section 995 motion to the newly added counts. The court granted the motion to dismiss counts 9, 10, 11 and 12.

During trial, the trial court granted appellant's section 1118.1 motion and dismissed count 8.

Appellant contends counts 5 and 7 should also have been dismissed because they were not supported by the evidence presented at the preliminary hearing.

Counts 5 and 7 charged appellant with violating section 311.3, subdivision (a). That section provides as follows: "A person is guilty of sexual exploitation of a child if he or she knowingly develops, duplicates, prints, or exchanges any 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 that depicts a person under the age of 18 years engaged in an act of sexual conduct."

"A defendant may be held to answer if there is some rational ground for assuming the possibility that an offense has been committed and that the accused is guilty of it. [Citation.] The information will be set aside only where there is no evidence that a crime has been committed or there is no evidence to connect the defendant with a crime shown to have been committed. [Citation.] Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information. [Citation.]"' (*People v. Superior Court (Smart)* (1986) 179 Cal.App.3d 860, 864.)" (*People v. Superior Court* (*Lujan*) (1999) 73 Cal.App.4th 1123, 1127.)

"In determining if charges in an information can withstand a motion under section 995, neither the superior court nor the appellate court may reweigh the evidence or determine the credibility of the witnesses. [Citations.] Ordinarily if there is some evidence in support of the information, the reviewing court will not inquire into its sufficiency. [Citations.] Thus, an indictment or information should be set aside only when there is a total absence of evidence to support a necessary element of the offense charged. [Citations.]" (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226.) However, every legitimate inference that may be drawn from the evidence must be drawn in favor of the information, and an information will not be set aside if " ' there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.' (*People v. Slaughter* (1984) 35 Cal.3d 629, 637.)" (*People v. Superior Court* (*Jurado*), *supra*, 4 Cal.App.4th at p. 1226.)

Appellant contends there was no evidence whatsoever that he developed, duplicated, printed, or exchanged the videos found on his laptop. Appellant argues that "It is common knowledge that many, if not all, laptop computers have a built-in camera."

Detective Velazquez's testimony at the preliminary hearing established that Tara had discovered eight videos on appellant's computer and Detective Velazquez had recovered them and viewed them. The preliminary hearing testimony did not include any testimony by Tara or any evidence about a camera in the bathroom. The evidence presented at the preliminary hearing did not establish how appellant recorded the videos, but only that Detective Velazquez was able to retrieve the videos from appellant's computer and view them. As a result, the evidence at the preliminary hearing established only that pictures were on the computer, with no indication how they came to be there. We need not determine, however, whether this was sufficient evidence to allow these charges to be filed since, as we explain below, the evidence presented at trial was insufficient to sustain the convictions on the challenged counts.

2. *The plea deal*

Appellant contends he was misled by the prosecutor, his counsel, and the court as to the maximum sentence he was facing before he rejected the plea deal and thus received ineffective assistance of counsel. In addition, he contends the prosecutor failed to make the necessary sentence allegations under section 647, subdivision (l) in the original and amended informations.

Appellant was charged with three counts of section 647, subdivision (j)(3), an invasion of privacy with a camera, a misdemeanor. Subdivision (l) of that section provides that (1) a second or subsequent violation of subdivision (j) is punishable by imprisonment in county jail, not exceeding one year, or a fine, or by both and (2) if the victim is a minor, the violation is punishable by imprisonment in county jail or a fine or both.

At the preliminary hearing on April 24, 2013, appellant was offered a term of six years for count one, and told by the court he could face "up to eight years on count 1 alone."

On July 16, 2013, prior to the hearing on the motion to dismiss, appellant was offered five years for a guilty plea to counts 6, 8, 10 and 12. Defense counsel advised appellant he was "looking at over 10 years."

After the motion to dismiss counts 9 through 12 was granted, both the prosecution and defense calculated appellant's maximum exposure as 10 years 6 months. Appellant was not advised he could face additional time because section 647, subdivision (l) permitted consecutive one-year terms for each of counts 2, 3, and 4.

At sentencing, after the prosecutor requested a 13-year, 2-month sentence, defense counsel argued the sentence should be only 10 years, 6 months based upon the prior representations made.

In order to establish a claim of ineffective assistance of counsel in the context of a defendant's rejection of a proffered plea bargain, the defendant must show that "(1) counsel's representation was deficient, i.e., it fell below an objective standard of

reasonableness under prevailing professional norms; *and* (2) counsel's deficient performance subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Alvernaz* (1992) 2 Cal.4th 924, 936-937, italics in original.)

Appellant cites *Lafler v. Cooper* (2012) ___U.S.___ 132 S.Ct. 1376 (*Lafler*), in which the defendant rejected a plea offer of 51 to 85 months because counsel told him the prosecution would be unable to establish the element of intent in a murder case. The actual sentence imposed was 185 to 360 months, more than three and one-half times the deal offered. (*Id.* at p. 1383.) The parties conceded deficient performance by counsel. The Supreme Court held the defendant established a reasonable probability he would have accepted the plea absent his counsel's representations.

Here, although both counsel and the court told appellant he had a maximum exposure of over ten years, he was told prior to trial he could be sentenced to eight years on count 1 alone. At a subsequent hearing at a motion to dismiss allegations in the information, he was told he could face an additional five years for counts 6, 8, 10 and 12. Still, appellant rejected the subsequent offers of three and five years. In addition, he never proposed a counteroffer even though his counsel urged him to accept the plea offer. The court's comments at sentencing indicate appellant's reason for rejecting the offers was that he did not commit the crimes. Thus, this case does not resemble the facts in *Lafler*, *supra*, ___ U.S. ___, 132 S.Ct. 1376. There is no evidence he would have accepted any of the offers even if he had been informed of the 13 year, 2 month maximum. Appellant failed to establish any prejudice and thus cannot meet the second prong of the ineffective assistance of counsel requirements.[2]

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[2] The People concede that appellant's claim would be more appropriate in a habeas corpus petition.

3. Sufficiency of evidence on counts 3, 6, 5, and 7

a. Count 3 (section 647, subdivision (j)(3))

Section 647, subdivision (j)(3)(A) defines the misdemeanor of disorderly conduct as, inter alia: "Any person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room . . . or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person."

Appellant contends that the prosecution did not present any evidence that Patience had not consented to being videotaped. Patience did not testify at trial. Only Tara testified she had not given her consent. Tara testified the video showing Patience was taken in appellant's bathroom. In the same video, appellant was shown activating the camera, and showed Tara and Frances using the toilet. Tara testified the recording device was not visible.

Patience was nine years old at the time, so consent was irrelevant. Just as Patience could not consent to sexual relations with appellant, she could not give valid consent to being videotaped. (*People v. Duncan* (1987) 189 Cal.App.3d 1348, 1358; see *People v. Hillhouse* (2003) 109 Cal.App.4th 1612, 1621.)

b. Count 6 (section 311.11)

Count 6 charged appellant with possession of matter which "depicts a person under 18 years of age personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4." (§ 311.11.)

Section 311.4 defines sexual conduct to include "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer," and "excretory functions performed in a lewd or lascivious manner."

Patience and Frances were filmed undressing or going to the bathroom. Appellant contends that there was no sexual conduct as defined by section 311.4 since they were neither performing excretory functions in a lewd or lascivious manner nor were they exhibiting their genitals or pubic or rectal areas for the purpose of sexual stimulation of the viewer. Appellant also contends there was no "exhibition" because the girls were not posed.

"The words, 'exhibition of the genitals, pubic or rectal area' and 'for the purpose of sexual stimulation of the viewer,' are part of the same phrase, the latter language serving to modify the former. Together, they speak to the content of the material targeted by the statute rather than the photographer's intent and describe what is meant in part by the term 'sexual conduct.' It is because the language is meant to be read together that simple, straightforward nude photographs of children without more would not fall within the purview of the statute. Such photographs, even if they should depict the pubic or rectal areas of children, would not have been taken for the apparent purpose of the sexual stimulation of the viewer." (*People v. Cantrell* (1992) 7 Cal.App.4th 523, 542-543.) The conduct section 311.11 is intended to criminalize is the production of pornographic material. (*Ibid.*)

In *People v. Kongs* (1994) 30 Cal.App.4th 1741 (*Kongs*), a photographer took pictures of a minor child spreading her legs or doing cartwheels, focusing on her genitalia. In upholding his convictions for various sexual offenses, the court discussed the definition of "sexual conduct." (*Id*. at p. 1753-1754.) It found the trier of fact should focus on the following factors: "1) whether the focal point is on the child's genitalia or pubic area; 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." (*Id*. at p. 1755.)

The only one of these factors required to be found by the trier of fact is factor 6. In this case, a trier of fact could reasonably find based on the evidence that appellant intended to use what he had surreptitiously filmed for the purpose of sexually stimulating himself. (*People v. Kongs, supra*, 30 Cal.App.4th at pp. 1753-1754 [focus was on the intent of the photographer].) However, evidence to support the remaining factors is limited to factor 4, the child's nudity. We have found no case to suggest that evidence of only one of the five remaining factors is sufficient to support a conviction and are mindful of the injunction in *People v. Spurlock* (2003) 114 Cal.App.4th 1122, that courts should not give an expansive interpretation to prohibition on the exhibition of the genitals in interpreting theses statutes. We conclude, as a result, that there was insufficient evidence to support the conviction on this count, and reverse.

c. Counts 5 and 7 (section 311.3, subdivision (a))

Appellant contends the convictions in counts 5 and 7 for violation of section 311.3, subdivision (a) should be reversed on the same grounds as the count 6 conviction, that is, because the videos do not exhibit sexual conduct.

Subdivision (b) of section 311.3 defines "sexual conduct" for the purpose of section 311.3, subdivision (a) as sexual intercourse, penetration of the vagina, masturbation, sadomasochistic abuse or "(5) Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer. [¶] (6) Defecation or urination for the purpose of sexual stimulation of the viewer."

This definition of "sexual conduct" is slightly different than the definition contained in section 311.4. However, courts have interpreted it in a parallel manner, and applied the test set forth in *Kongs, supra.* (See *People v. Spurlock, supra*, 114 Cal.App.4th at pp. 1127-1128.) Accordingly, we reverse the convictions on these counts for the reasons explained above.

4. Sentencing

Appellant contends the court should have stayed the sentences on counts 5 and 7 pursuant to section 654 because they were committed pursuant to the same objective and course of conduct as counts 2 and 3. In light of our holding, we need not address this argument.

DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded for resentencing.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.