Filed 2/23/12 In re Forrest B. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re FORREST B., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. FORREST B., Defendant and Appellant.	B228574 (Los Angeles County Super. Ct. No. MJ19360)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robin R. Kesler, Juvenile Court Referee. Affirmed.

Susan B. Gans-Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lawrence M. Daniels and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The juvenile court sustained a petition filed under Welfare and Institutions Code section 602 against the minor and appellant Forrest B. alleging two counts of a lewd act on a minor. The minor contends on appeal that his motion to dismiss the petition should have been granted because there was insufficient evidence of an element of the crime, namely, he touched the child with the intent to sexually exploit her. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case.*

Seventeen-year-old Forrest lived with his aunt and uncle, who had three children, including four-year-old Olivia. On February 3, 2010, Olivia and Forrest were watching a movie. When Forrest left the room, Olivia asked her father why " 'Forrest always touches [her] pottie,' " which her parents taught her refers to vagina. Olivia's father noticed that Forrest once put Olivia in the bath, which was unusual, although Forrest explained he did it because Olivia smelled bad. Olivia also told her father Forrest touched her pottie when he put her in the bath. Forrest denied touching Olivia.

Olivia testified that while they were watching a movie, Forrest touched her "private parts," pointing to between her legs. He touched her private parts "a lot," and one time he touched her in the area "that connects to my pottie and my other stuff." He put his hands under her clothes "and stuck his finger inside there."

B. *Defense case.*

Forrest went to live with his aunt and uncle in April 2009, after his mother sent him there from Washington, telling him he was just staying in California for the summer. Forrest babysat the children about once a week. If he ever touched Olivia he did not intend for it to be inappropriate or sexual, and it would only have occurred in the course of caring for her. Once, they were watching cartoons and Olivia was picking at her crotch area. When she said she had a "wedgie," Forrest helped her get it out. He put

Olivia in the bath once because she'd been playing outside and gotten into something that made her smell bad.

During pre-polygraph testing, he said that the touching might have been 5 percent sexual, but he only said that to try and get out of the situation.

II. Procedural background.

A petition was filed under Welfare and Institutions Code section 602 alleging two counts of lewd act on a child (Pen. Code, § 288, subd. (a)). After a court trial, the court, on September 21, 2008, sustained both counts, found the crimes to be felonies, and declared Forrest to be a ward of the court. The court allowed Forrest to remain in his father's care in Missouri.

DISCUSSION

III. The trial court did not err by denying the minor's motion to dismiss.

After the People rested, the defense moved to dismiss based on insufficiency of the evidence (Welf. & Inst. Code, § 701.1), and the trial court denied the motion. Forrest contends that his motion to dismiss should have been granted because at the time the motion was made (at the close of the prosecution's case-in-chief), there was insufficient evidence he touched Olivia with the "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." (Pen. Code, § 288, subd. (a).)

Welfare and Institutions Code section 701.1 is similar to a motion under Penal Code section 1118. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 727.) When a defendant in a criminal matter makes a motion under section 1118, the judge must weigh the evidence, evaluate the credibility of witnesses, and decide that the case against the defendant has been proved beyond a reasonable doubt. (*In re Anthony J.*, at p. 727.) We therefore determine whether the People introduced sufficient evidence at the close of their case. (*Id.* at pp. 727-728.)

The same standard of appellate review applicable to reviewing the sufficiency of the evidence to support a criminal conviction applies to considering the sufficiency of the evidence in a juvenile proceeding. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605;

In re Ryan N. (2001) 92 Cal.App.4th 1359, 1371.) "Consequently, the standard for review of the juvenile court's denial of a motion to dismiss is whether there is substantial evidence to support the offense charged in the petition. [Citation.] In applying the substantial evidence rule, we must 'assume in favor of [the court's] order the existence of every fact from which the [court] could have reasonably deduced from the evidence whether the offense charged was committed and if it was perpetrated by the person or persons accused of the offense. [Citations.] Accordingly, we may not set aside the trial court's denial of the motion on the ground of the insufficiency of the evidence unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached by the court below.' [Citations.]" (*In re Man J.* (1983) 149 Cal.App.3d 475, 482.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 288, subdivision (a), states that "any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony. . . ." The defendant therefore must have committed the act with the intent to sexually exploit the child. (*People v. Martinez* (1995) 11 Cal.4th 434, 443.) The conduct must be sexually motivated. (*Ibid.*) Intent, however, can seldom be proved by direct evidence. (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 299.) But it may be inferred by the circumstances; for example, extrajudicial statements, the parties' relationship, other acts of lewd conduct, offering a reward for cooperation or physical evidence of sexual arousal and clandestine meetings. (*In re Jerry M.*, at pp. 299-300 [insufficient evidence that 11-year-old boy who touched the breasts of three girls did so with the requisite intent under Penal Code section 288, subdivision (a)].)

In this case, Olivia testified that Forrest touched her "pottie" multiple times. The trier of fact could have found that multiple touchings, as opposed to a single incident,

showed that Forrest touched Olivia with the intent to sexually exploit her. Moreover, there was evidence that Forrest put his finger inside Olivia's vagina. She testified:

"Q [The Prosecutor:] When he touched your pottie, did he touch you on your clothes or put his hand underneath your clothes? [¶] . . . [¶]

"The Witness: Underneath my clothes and stuck his finger inside there.

"Q [The Prosecutor:] He stuck his finger inside there?

"A Uh-huh.

"Q And that's your pottie you're talking about?

"A (Nods head up and down.)

"Q Is that a 'yes'?

"A (Nods head up and down.)

"The Court: She's nodding her head up and down in the affirmative, or to say 'yes.' [¶] Is that true, Olivia?

"The Witness: Uh-huh.

"The Court: Is that a 'yes'?

"The Witness: Uh-huh.

"The Court: She keeps saying 'uh-huh' and she's nodding her head up and down in the same direction."

This is, as the minor points out, ambiguous testimony. But "[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) We cannot resolve credibility issues on appeal, and that would seem to be especially true where, as here, the juvenile court said, just before the People rested, that it found Olivia to be credible. The trier of fact, who was in a position to observe Olivia, could have concluded that she was saying Forrest put his finger in her "pottie"—vagina. There could be no reason for Forrest to do this other than to sexually exploit Olivia; and therefore there was sufficient evidence of the intent element of a crime under Penal Code section 288, subdivision (a).

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.