Filed 3/1/17 In re M.H. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re M.H., a Person Coming Under the Juvenile Court Law.	B270557 (Los Angeles County Super. Ct. No. KJ39590)
THE PEOPLE, Plaintiff and Respondent, v. M.H., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Geanene Yriarte and Christina L. Hill, Judges. Reversed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noel P. Hill, Deputy Attorney General, David A. Boet, Deputy Attorney General, for Plaintiff and Respondent.

The juvenile court adjudged M.H. a ward of the court pursuant to Welfare and Institutions Code section 602 based upon a finding that M.H. annoyed or molested his 16-year-old cousin in violation of Penal Code section 647.6, subdivision (a)(1).[1] M.H. contends that the evidence is insufficient to support the court's finding. We agree and reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

During the summer of 2015, M.H. lived in a house with his parents, grandparents, and other relatives, including a female cousin, D.B. At that time, M.H. was 17 years old and D.B. was 16 years old. According to D.B., one night that summer M.H. walked into her room at about 10:00 or 11:00 p.m. while she was talking to her boyfriend on her telephone. M.H. asked D.B., "[C]an we do it?" D.B. told him, "No. Get out." M.H. asked again, and said something like, "[C]ome on, it will benefit both of [us]." D.B.'s boyfriend asked to speak with M.H. When D.B. moved to pass the telephone to M.H., M.H. left the room. D.B. then locked her door.

When asked at trial how she felt about the incident, D.B. said she "[j]ust felt normal," and that she had "brushed it off." She later testified that "it kind of bothered [her]," but she "really didn't think of it as a big deal." It was "just something dumb he did." She testified that she was not afraid that M.H. would do something to her, and that M.H. had not said anything inappropriate to her since that incident.

The day after the incident, D.B. told her and M.H.'s grandparents, M.H.'s mother (D.B.'s aunt), and M.H.'s 13-year-old sister C.H.—all of whom lived in the same house—about the incident. C.H. then told D.B. that M.H. had once come into her

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

room, touched her leg, and asked for sex. At trial, C.H. described this incident by stating that M.H. came in to her room around midnight, shook her thigh to wake her up, and asked her if she "wanted to do it." C.H. understood that M.H. was asking to have sex. C.H. told M.H. to go back to bed, and M.H. left. The incident occurred about four years before the incident involving D.B. M.H. was 13 years old at the time, and C.H. was 9 years old. C.H. testified that she "didn't care" about the incident "because it was only one time, and he never bugged me." She did not feel that she needed to be protected from M.H.

D.B. and C.H. then talked to C.H.'s and M.H.'s mother about the incident involving M.H. and C.H. C.H. and D.B. thereafter shared a bedroom and locked the room's door at night.

At some point, the incidents came to the attention of social workers and law enforcement. In October 2015, Los Angeles County Deputy Sheriff Jeffrey Burke talked to D.B. about the incident between her and M.H. According to Deputy Burke, D.B. told him that M.H. came into her room and asked her "if she wanted to do a two-minute quickie and that it would benefit both of them." D.B. also told Deputy Burke that M.H. was "kind of like begging her to do it," and that D.B. told him to "knock it off or [she] would tell [M.H.'s] parents." M.H. then left the room. D.B. told the deputy that "she just kind of blew it off, kind of shrugged it off, like it was just [M.H.] being [M.H.]" She also told the deputy that M.H. had never touched her inappropriately.

On January 4, 2016, the Los Angeles County District Attorney filed a petition pursuant to Welfare & Institutions Code section 602, alleging three counts. Counts 1 and 2 arose from the incident involving C.H., and count 3 was based on the incident with D.B. In count 1, the petition alleged that M.H. had contact with a minor for a sexual offense in violation of section 288.3,

subdivision (a). Counts 2 and 3 alleged that M.H. annoyed or molested a minor in violation of section 647.6, subdivision (a)(1).

Following an adjudication hearing, the juvenile court dismissed counts 1 and 2, and sustained the petition as to count 3. At a disposition hearing, the court placed M.H. in his parents' home on probation.

DISCUSSION

M.H. contends that the evidence is insufficient to support the finding that he violated section 647.6, subdivision (a)(1). We agree.

When an appellant contends the evidence is insufficient to support a judgment, we "review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 and *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Section 647.6, subdivision (a)(1), criminalizes conduct that "annoys or molests any child under 18 years of age." The words "annoys" and "molests" in the statute "are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person . . . 'especially by continued or repeated acts' " or " ' "to offend." ' " (*People v. Lopez* (1998) 19 Cal.4th 282, 289 (*Lopez*); see also *In re D.G.* (2012) 208 Cal.App.4th 1562, 1571.) Conduct that violates section 647.6 must be "objectively and unhesitatingly irritating or annoying" and "motivated by an abnormal sexual interest in children in general or a specific child." (*People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396 (*Phillips*); see also *Lopez*, *supra*, 19 Cal.4th at p. 289.) " 'The deciding factor . . . is that the defendant has engaged in

offensive or annoying sexually motivated conduct which invades a child's privacy and security.' " (*In re D.G.*, *supra*, at p. 1571, italics omitted.)

The statute " 'contemplates a crime more serious than an indiscreet gesture, public nuisance, or sexual indiscretion,' " and is directed at conduct that is " 'more offensive' " than lewd conduct in a public place (§ 647, subd. (a)) or indecent public exposure (§ 314, subd. (1)). (*Phillips*, *supra*, 188 Cal.App.4th at p. 1397, quoting *People v. Tate* (1985) 164 Cal.App.3d 133, 138.) Its primary purpose is to protect " ' "children from interference by sexual offenders" ' " and to apprehend, segregate, and punish such offenders. (*In re Gladys R.* (1970) 1 Cal.3d 855, 868 [discussing former section 647a, the predecessor to section 647.6]; *People v. Shaw* (2009) 177 Cal.App.4th 92, 103; see also *Phillips*, *supra*, 188 Cal.App.4th at p. 1396 [statute's purpose is to protect children from "sexual predators"].) To this end, the Legislature has declared that a violation of section 647.6 constitutes "sexual abuse" and "sexual assault" for purposes of the Child Abuse and Neglect Reporting Act (§ 11165.1), and required adult perpetrators to register as sex offenders. (§ 290; *People v. Brandao* (2012) 203 Cal.App.4th 436, 441 (*Brandao*).)[2] A juvenile who is declared a ward of the court based on a violation of section 647.6 must likewise register as a sex offender if the juvenile court commits

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[2] A person convicted of violating section 647.6 has also committed a "sex offense" for purposes of certain provisions of the Education Code and, as a result, cannot obtain a teaching credential or be employed by a school district. (Ed. Code, §§ 44010, subd. (a); 44346, subd. (a)(2); 44425, subd. (a); 44436; 44836, subd. (a)(1); 45123, subd. (a).) In addition, an employer who hires a person convicted of violating section 647.6 is also required to notify the parents or guardians of any minor who will be supervised or disciplined by the employee. (§ 11105.3, subd. (c)(1).)

the juvenile to the Department of Corrections and Rehabilitation because of the violation. (§ 290.008; *Ruelas v. Superior Court* (2015) 235 Cal.App.4th 374, 380-381.)

Courts have found section 647.6 (or its predecessor statute) violated in the following illustrative cases. In *In re D.G.*, *supra*, 208 Cal.App.4th 1562, a father repeatedly offered his daughter money in exchange for oral sex. (*Id.* at p. 1572.) In *Phillips*, *supra*, 188 Cal.App.4th 1383, the defendant masturbated in a car outside a high school with the intent to be observed by a child as students were dismissed from school, and a child did observe the conduct. (*Id.* at p. 1397.) In *People v. Thompson* (1988) 206 Cal.App.3d 459 (*Thompson*), the defendant drove his car past and alongside a 12-year-old girl riding a bicycle, stared at her, admired her legs, and made sexually suggestive gestures to her with his hands and lips. (*Id.* at pp. 461-462, 466-467 & fn. 3.) In *People v. La Fontaine* (1978) 79 Cal.App.3d 176, the defendant took a 13-year-old boy for a ride in his car and offered to pay the boy in exchange for performing oral sex on the boy. (*Id.* at pp. 179-180.) In *People v. Carskaddon* (1959) 170 Cal.App.2d 45, the defendant approached a 17-year-old girl he did not know and asked her "extremely lewd and obscene questions . . . and comments" with respect to whether "she had ever had certain unnatural acts performed upon her." (*Id.* at p. 46.) And in *People v. McNair* (1955) 130 Cal.App.2d 696, the defendant stood naked at his apartment window exposing his penis to a seven-year-old girl; he admitted he was about to masturbate and would have let the girl " 'look if she want[ed] to.' "[3] (*Id.* at pp. 697-698.)

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[3] Cases involving crimes occurring before 1988 addressed former section 647a, the predecessor to section 647.6, subdivision (a), which was identical to the current statute in relevant respects. (See *Lopez*, *supra*, 19 Cal.4th at p. 289.)

M.H.'s conduct in the present case is not comparable to the conduct described in the foregoing cases. M.H., then 17 years old, asked his then 16-year-old cousin with whom he resided to "do it," or to do a "two-minute quickie," because he thought it would "benefit" both of them. Other relatives were in the house at the time and the interaction took place while D.B.'s boyfriend remained on the telephone. M.H. did not touch D.B., and there is no evidence to suggest that M.H. posed his question in a menacing or intimidating manner. There is no evidence that he exposed himself, touched himself, or used lewd or obscene language (beyond asking to "do it" or for a "quickie"). Although M.H. asked D.B. after D.B.'s initial refusal and did not leave the room until D.B. said she would tell his parents, the evidence does not suggest that D.B.'s "privacy and security" were ever threatened. (*In re D.G.*, *supra*, 208 Cal.App.4th at p. 1571.) After the incident, M.H. did not repeat the offending conduct, and never touched D.B. inappropriately.

Although the question whether conduct violates section 647.6 depends upon whether it would have caused a *normal person* to be unhesitatingly irritated (see *Lopez*, *supra*, 19 Cal.4th at pp. 290-291), the victim's reaction can be evidence of how a normal person would feel under the same circumstances.[4] (See, e.g., *Thompson*, *supra*, 206 Cal.App.3d at p. 466.) Here, D.B. said she felt "normal" after the interaction with M.H., that she "brushed

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[4] The objective standard for determining whether conduct is annoying or molesting "may well stem, at least in part, from the fact that the statute's scope includes very young children who might not be subjectively irritated by the conduct." (*Brandao*, *supra*, 203 Cal.App.4th at p. 446.) The reaction of a "very young" child, therefore, might not be a reliable indicator of the wrongfulness of the perpetrator's conduct. When, as here, however, the child victim is 16 years old, the child's reaction is more likely indicative of how a "normal person" would feel.

it off," and "really didn't think of it as a big deal." Although she also stated that the incident "kind of bothered [her]," in light of D.B.'s other statements, such bothering does not constitute the kind of annoying or molesting behavior prohibited by section 647.6. Based on the record, there is no reason to believe that a normal person would have felt any different than D.B. under the same circumstances.

M.H.'s conduct, while inappropriate, was not the conduct of a sex offender or sexual predator against whom section 647.6 is directed. Based on our review of the entire record and for all the foregoing reasons, we conclude that the evidence is insufficient to support the finding that M.H. committed an act in violation of section 647.6.[5]

[5] M.H. also contends that the court erred in setting a maximum term of confinement. Because we reverse the judgment based on the insufficiency of the evidence, we do not reach this issue.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

JOHNSON, J.

LUI, J.