Filed 10/24/19 In re V.R. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re V.R., a Person Coming Under the Juvenile Court Law.	B295142 (Los Angeles County Super. Ct. No. NJ29679)
THE PEOPLE, Plaintiff and Respondent, v. V.R., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, John H. Ing, Judge. Affirmed.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Following an incident with a female student at middle school, 14-year-old V.R. was found to have committed misdemeanor sexual battery. On appeal, V.R. contends the evidence is insufficient to show he touched the victim for any sexual purpose. He further contends Penal Code section 243.4, subdivision (e)(1),[1] the statute defining the offense of misdemeanor sexual battery, is void for vagueness because the terms "sexual arousal," sexual gratification," and "sexual abuse" are not defined. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Jurisdiction Hearing

M.C. testified V.R. was someone she had seen around the middle school campus. On the morning of May 18, 2018, M.C. and V.R. were walking around the baseball field in different physical education classes. M.C. was accompanied by a friend, and she heard V.R. behind her laughing and talking with two friends. She then felt someone "grab" and/or "slap" the right side of her "butt." M.C. had not consented to anyone touching her.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

M.C. turned around and demanded to know who had touched her and why. V.R. and his friends laughed and said it was "a joke" and "a dare." V.R. admitted he had slapped her. In response, M.C. shoved V.R. and reported the incident to school authorities.

V.R. neither testified nor presented other evidence in his defense.

At the conclusion of the hearing, the juvenile court found V.R. had committed sexual battery by sexual abuse.

B. Disposition Hearing

At the disposition hearing, the juvenile court placed V.R. on six months of informal probation (Welf. & Inst. Code, § 725) on condition that he complete counseling and 50 hours of community service.

V.R. filed a timely notice of appeal.

DISCUSSION

A. Substantial Evidence Supports the Juvenile Court's Finding V.R. Committed Sexual Battery

V.R. contends the evidence is insufficient to support the juvenile court's finding he committed sexual battery. We disagree.

The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as that for reviewing an adult conviction. (*In re V.V.* (2011) 51 Cal.4th 1020, 1026.) In either type of case, " 'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from

which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) "Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.)

Section 243.4, the misdemeanor sexual battery statute, provides in relevant part: "Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery . . . ." (*Id.*, subd. (e)(1).) "As used in this subdivision, 'touches' means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim." (*Id.*, subd. (e)(2).) " 'Intimate part' " means "the sexual organ, anus, groin, or buttocks of any person, and the breast of a female." (*Id.*, subd. (g)(1).)

The parties agree, and we concur, that the evidence fails to show V.R. touched M.C.'s buttocks for the purposes of either sexual arousal or sexual gratification. The issue, therefore, is whether V.R.'s conduct constituted sexual abuse as found by the juvenile court.

As used in section 243.4, subdivision (e)(1), " '[S]exual abuse' includes the touching of a woman's breast [or buttocks], without consent, for the purpose of insulting, humiliating, or intimidating the woman, even if the touching does not result in actual physical injury." (*In re Shannon T.* (2006) 144 Cal.App.4th 618, 622 (*Shannon T.*); accord, *M.N. v. Morgan Hill*

Unified School Dist. (2018) 20 Cal.App.5th 607, 622.) The manner of touching is relevant, in that the trier of fact, " 'looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent.' " (*People v. Martinez* (1995) 11 Cal.4th 434, 445; see also *Shannon T.*, *supra*, 144 Cal.App.4th at p. 622 [the perpetrator's "purpose in [assaulting the victim] can be inferred from the act itself together with the surrounding circumstances"].)

V.R. argues there is no evidence he touched M.C. for the purpose of insulting, humiliating, intimidating or even physically harming her. He also argues there is no evidence M.C. was actually humiliated, intimidated or physically harmed by the touching. The juvenile court rejected similar arguments by V.R, and the record does not permit us to second guess its analysis: "the court does infer that the touching that took place in this case was for the purpose to cause pain, injury or discomfort. The fact that [V.R.] himself indicated that this was a joke, they were laughing, it was on a dare, [MC.'s] response to the touching, which was certainly not invited and without consent, circumstantially, this indicates that the act was done for the purpose of causing discomfort to [M.C.]"

One can further reasonably infer from M.C.'s reaction that she felt both insulted and embarrassed by V.R.'s conduct. The touching occurred in view of V.R.'s friends, who laughed at M.C.'s reaction. Right after the incident occurred, M.C. demanded to know who had assaulted her and why, and when V.R. admitted assaulting her, she shoved him and immediately told school personnel. Accordingly, substantial evidence supports the finding that V.R. touched M.C. for the purpose of insulting,

humiliating, and intimidating her, and thereby committed misdemeanor sexual battery.[2]

B. V.R.'s Void-For-Vagueness Claim Is Without Merit

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient precision that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357; see also *People v. Heitzman* (1994) 9 Cal.4th 189, 199.)

V.R. contends in the absence of statutory definitions of "sexual arousal," "sexual gratification", or "sexual abuse," the meaning of section 243.4 "is anything but clear" and "it does not provide adequate notice to California citizens." Consequently, he claims, section 243.4 is unconstitutionally vague.

We assume from his conclusory assertion that V.R.'s sole challenge to section 243.4 is that it fails to give ordinary people a reasonable opportunity to know what is prohibited, so they may act in conformity with its provisions. " 'The rule is well

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[2] V.R. also asserts in passing that "[t]his is a matter that should have been handled . . . within the school's disciplinary system," and that it was "overreach to charge V.R. with the criminal offense of sexual battery." The decision of whether to file charges, and if so what charges to file, is a matter of prosecutorial discretion. (*People v. Valli* (2010) 187 Cal.App.4th 786, 801.) Prosecutorial discretion is founded upon constitutional principles of separation of powers and due process of law (*ibid.*), and V.R. suggests no basis for judicial intervention into the exercise of prosecutorial discretion in his case.

established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations.' [Citation.] If the statute clearly applies to a criminal defendant's conduct, the defendant may not challenge it on grounds of vagueness. [Citations.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095 (*Tobe*).) V.R.'s touching of M.C.'s buttocks fell squarely within section 243.4, subdivision (e)(1) prohibition on touching for the purpose of sexual abuse. Because section 243.4 "clearly applies to [V.R.'s] conduct," he may not challenge it on grounds of vagueness. (*Ibid.*)

"However, in some cases, a defendant may make a facial challenge to the statute, if he argues that the statute improperly prohibits a ' "substantial amount of constitutionally protected conduct," ' whether or not its application to his own conduct may be constitutional. [Citation.]" (*Tobe*, *supra*, 9 Cal.4th at p. 1095.) With respect to the phrase "sexual abuse," section 243.4 cannot be held void for vagueness if that term reasonably can be construed to provide sufficient clarity. (*Id.* at p. 1107.) To this end, we look to see whether "sexual abuse" may be given a reasonable and practical construction or the term made reasonably certain by reference to secondary sources such as long established or commonly accepted usage, usage at common law, judicial interpretations of statutory language or of similar language, and legislative history and purpose. (*City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193, 1202; *People v. Nguyen* (1984) 161 Cal.App.3d 687, 692.)

Courts of appeal have given a "reasonable and practical construction" to the term "sexual abuse." The meaning of sexual abuse, as it appeared in section 289 (sexual penetration by a foreign object), was held in *People v. White* (1986) 179 Cal.App.3d 193 to be as follows: " 'To "abuse" someone is to hurt them by treating them badly, or to cause pain or injury through mistreatment. When such mistreatment is directed to a victim's sexual or "private" parts, the resulting conduct would certainly be considered sexual abuse.' " (*Id.* at p. 205.) As explained in *Shannon T.,* with interpreted section 243.4, sexual abuse occurs as well when sexual mistreatment is intended to cause psychological pain. "[T]he sexual battery statute's use of the phrase touching 'for the specific purpose of . . . sexual abuse' encompasses a purpose of insulting, humiliating, intimidating, or physically harming a person sexually by touching an 'intimate part' of the person." (*Shannon T., supra*, 144 Cal.App.4th at p. 621.)

Given this reasonable and practical construction of the term "sexual abuse," section 243.4, subdivision (e)(1) is sufficiently definite to provide adequate notice of the conduct proscribed, and to provide sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. It accordingly is not unconstitutionally vague. (*Tobe*, *supra*, 9 Cal.4th at pp. 1106—1107.)

DISPOSITION

The jurisdiction and disposition orders are affirmed.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

CHANEY, Acting P. J.

BENDIX, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.