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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO RODRIGUEZ, Defendant and Appellant.	B284217 (Los Angeles County Super. Ct. No. KA110127)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Fernando Rodriguez appeals from a judgment of conviction following a jury trial. A jury found defendant guilty of violating: Penal Code[1] section 288.7, subdivision (b), oral copulation or sexual penetration on a child under the age of 10, a felony (counts 1 & 5); section 288, subdivision (a), lewd conduct with a child, a felony (counts 2 & 6); section 647.6, subdivision (a)(1), annoying or molesting a minor, a misdemeanor (count 3); and section 313.1, subdivision (a), distributing or exhibiting harmful material to a minor, a misdemeanor (count 4). The trial court sentenced defendant to a total term of 40 years to life on the felony counts and imposed one-year terms for the misdemeanor counts to be served concurrently.

Defendant contends he received an unfair trial following an outburst by the victim's father on the witness stand. Defendant also argues the judgment for count 3 must be reversed because the trial court gave conflicting jury instructions. We affirm.

II. BACKGROUND

A. *Prosecution Case*

Alexandra was born in September 2007. She lived with her two brothers and her parents Alfredo and Rosa. In June 2013, Alexandra and her family moved into the same house as her aunt Mari, other relatives, and defendant.[2] After Alexandra moved in,

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1 Further statutory references are to the Penal Code.

2 Defendant was born in 1959.

defendant gave her several gifts and compliments. Alexandra thought defendant was nice at first, "[b]ut then he started to be weird." Defendant invited Alexandra into his bedroom, where he pulled down his pants and exposed his penis to her. Defendant told her to look at him, and masturbated and ejaculated in front of her.

After this incident, Alexandra left defendant's bedroom, walked to the backyard, and sat on a hammock. Defendant walked outside and sat down next to her. Defendant reached his hand under Alexandra's clothes and touched her "private part." Defendant stopped when he heard footsteps approaching. Alexandra's father called for her to come to the family bedroom.

Alexandra testified in detail about several other incidents of abuse by defendant while the family lived in the house with him. Alexandra and her family moved out of the house in April 2014, about half-a-year after moving in. Alexandra was almost seven years old.

Approximately a year after moving out of Mari's house, Alexandra's school teacher saw Alexandra touching her "private part." The teacher asked Alexandra about her action, and Alexandra told her that defendant had touched her. The teacher then contacted the principal, who notified Rosa. The matter was referred to the police, who conducted a forensic interview with Alexandra.

Alexandra received post-traumatic stress disorder counseling every week for two years. Alexandra told her therapist that defendant showed her pornographic videos on his cell phone. Alexandra reported that once, after watching the videos, defendant showed Alexandra a family picture with his

wife cut out. Defendant told Alexandra he liked her, and asked whether she wanted to be his wife when she grew up.

B. *Defense Case*

Defendant presented no evidence.

III. DISCUSSION

A. *Alfredo's Outburst Did Not Result in an Unfair Trial*

Defendant argues that an outburst by Alexandra's father during trial violated his due process rights to a fair trial. Near the end of the prosecutor's case-in-chief, Alexandra's father Alfredo was called to the stand to testify. At issue was the following examination by the prosecutor: "Q. During the time that you all lived in the same residence, did you see or hear [defendant] do anything inappropriate as it related to Alexandra? [¶] A. No. No. [¶] Q. Okay. And the person who I'm talking about, [defendant], is he an individual who is in the courtroom? [¶] The Court: Well, the [defendant] that you know, do you see that person in this courtroom? [¶] [Alfredo]: Yes. [¶] Q. [By prosecutor]: Can you please point to him. [¶] A. (The witness complied.) [¶] The Court: The witness has identified the defendant . . . for the record. [¶] [Alfredo]: Dog. Damn dog. [¶] [Defense counsel]: Objection, your honor. [¶] The Court: Relax, [Alfredo]. You need to control your emotions. [¶] I'm going to admonish the jury to disregard those last-moment comments by the witness. Please put them out of your mind. [¶] [Alfredo], relax. We're going to get you through this process as quickly as

we can. I see that you're very emotional, perhaps on the angry side. You need to control your emotions, and we'll get you through the process. [¶] [Prosecutor]: I have no other questions, Your Honor. [¶] The Court: All right, I'll tell you what—Well, [defense counsel], do you have any questions for [Alfredo]? [¶] [Defense counsel]: No, Your Honor."

Defense counsel moved for a mistrial, which the trial court denied. Defendant concedes the trial court did not err by denying the motion for a mistrial. However, defendant argues that based on the entire record, defendant received an unfair trial because of Alfredo's emotional outburst. Defendant asserts the jury could consider Alfredo's outburst as an affirmation of defendant's guilt, as vouching for Alexandra's testimony, and as evidence Alfredo knew of inculpatory information not revealed in court.

We disagree that the outburst requires a reversal. As an initial matter, the trial court handled the incident properly by admonishing the jury to disregard the outburst. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1024 [no basis for new trial where "[t]he isolated outburst in this case was followed by a prompt admonition"].)

Because defendant cannot reasonably argue that the trial court or prosecution erred in handling the outburst, defendant in effect argues that the outburst was a per se violation of his right to a fair trial, which cannot be cured by an admonition. Recently in a case where a witness referred to the defendant as a "devil" multiple times, the Supreme Court ruled that the right to an impartial jury free from improper influence does not require a trial court to sua sponte admonish the jury to ignore a witness's emotional outbursts. (*People v. Reed* (2018) 4 Cal.5th 989, 1008.) This holding implicitly recognizes that a witness's emotional

outburst calling a defendant names does not per se result in an unfair trial.

Even if we assume that the jury did not follow the admonition, the outburst did not infect the trial "with such unfairness as to render [defendant's] conviction violative of due process." (*People v. Garcia* (2014) 229 Cal.App.4th 302, 317.) The outburst would not reasonably cause a juror to conclude that Alfredo knew the defendant was guilty, believed Alexandra was testifying truthfully, or possessed other inculpatory information, as defendant contends.[3] Alfredo had established that he did not know anything about defendant's alleged conduct. He testified that he never saw or heard defendant do anything inappropriate relating to Alexandra and had no reason to distrust defendant before Alexandra's principal told him that defendant was giving Alexandra gifts. The more reasonable inference from Alfredo's outburst was that he was upset about what his daughter was going through including testifying at the trial, an unsurprising reaction by a parent.

In the context of the entire trial, the outburst was not significant. The trial started with Alexandra's detailed and compelling testimony over two days, and then her mother's testimony. Alfredo testified next. After Alfredo, two other witness testified, so Alfredo's outburst was not the last word the jury heard, making it less impactful. During closing argument the next day, the prosecution focused exclusively on Alexandra and her testimony and emphasized that one witness's testimony was sufficient for a conviction. The prosecution did not mention Alfredo, or his outburst.

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[3] Defendant cites *People v. Kirkes* (1952) 39 Cal.2d 719, 723, but that case discusses *prosecutor* misconduct.

Defense counsel, however, started closing by referring to Alfredo's outburst, quoting it in Spanish and explaining it translates to calling defendant "a mother fuckin' dog." Counsel used the name-calling to highlight that the trial involved high emotions, but the jury was obligated to separate out the emotions during deliberations. Defense counsel referred twice more to the "dog" comment to underscore the theme that defendant could only be convicted on the evidence, not due to the emotions surrounding the allegations.

Except for defense counsel's decision to remind the jury about the outburst, it was a minor incident. Alexandra's testimony was clearly sufficient for the jury to find defendant guilty even in the absence of the outburst, and nothing indicates that if the outburst had not occurred, the jury's verdict would not have been the same.

B. *Instructional Error for Count 3 Was Harmless*

Defendant also contends the trial court erred in instructing the jury as to count 3, annoying or molesting a child. (§ 647.6, subd. (a)(1).) Errors in jury instructions are questions of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569; *People v. Jandres* (2014) 226 Cal.App.4th 340, 358.)

The error stems from conflicting instructions about motive. The trial court instructed the jury: "The People are not required to prove that defendant had a motive to commit any of the crimes charged. In reaching your verdict, you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show the defendant is guilty. Not having a

motive may be a factor tending to show that the defendant is not guilty." (CALCRIM No. 370.)

As to count 3, the trial court instructed the jury: "The Defendant is charged in count 3 with annoying or molesting a child, in violation of Penal Code section 647.6. [¶] To prove that the defendant is guilty of this crime, the People must prove the following: [¶] 1. The defendant engaged in conduct directed at a child; [¶] 2. A normal person without hesitation would have been disturbed, irritated, offended, or injured by the defendant's conduct. [¶] 3. The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child; and [¶] 4. The child was under the age of 18 years at the time of the conduct. [¶] It's not necessary that the child actually be irritated or disturbed. It is also not necessary that the child actually be touched. [¶] And, again, it's not a defense that the child may have consented to the act." (CALCRIM No. 1122.)

Plainly CALCRIM No. 370, which instructs the jury that the prosecutor need not prove motive, conflicts with No. 1122, which requires the prosecution to prove defendant was motivated by an unnatural sexual interest in a particular child or children generally. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 (*Valenti*).) By giving these instructions, the trial court effectively removed the motive requirement from the jury's consideration for violation of section 647.6, subdivision (a)(1). (*Ibid.*; *People v. Mauer* (1995) 32 Cal.App.4th 1121, 1126-1127 (*Mauer*).) Respondent concedes instructional error occurred, but asserts it was harmless.

"Because due process principles require the prosecution to prove every element of the crime beyond a reasonable doubt, jury 'instructions *completely removing* the issue of intent from the

jury's consideration may constitute a denial of federal due process[.]'" (*Valenti, supra*, 243 Cal.App.4th at p. 1164.) We review a denial of federal due process under the harmless beyond a reasonable doubt standard. (*Id.* at p. 1166.) When a trial court fails to instruct on an element of the charged offense, "the error is harmless if the People can prove beyond a reasonable doubt that the omitted element was uncontested and supported by such overwhelming evidence that no rational juror could come to a different conclusion." (*Ibid.*, citing *Neder v. United States* (1999) 527 U.S. 1, 17-19, and *People v. Mil* (2012) 53 Cal.4th 400, 417-419 (*Mil*).) "[U]nder *Mil*, we must determine whether there is substantial evidence supporting a *contrary* finding on the omitted element. (*Mil, supra*, at pp. 417-419.) We therefore review the evidence in the light most favorable to defendant; we may not reweigh the evidence or resolve evidentiary conflicts." (*Valenti, supra*, 243 Cal.App.4th at pp. 1166-1167.)

Defendant was charged in count 3 with annoying or molesting a child based on the incident where defendant showed Alexandra a picture with his wife cut out and said that he wanted Alexandra to be his wife. Defendant contends that a properly instructed jury could have found that the prosecution did not prove abnormal sexual interest as a motive. He argues the jury instead could have concluded that defendant's comments were "consistent with grief after a divorce or a spouse's death."

Alexandra testified defendant showed her the picture, said he wanted her to be his wife, and asked if she wanted to be his wife when she grew up, all on the same day he showed her pornographic videos. This conduct demonstrates that defendant had an abnormal sexual interest in Alexandra. Further, the prosecutor in her closing argued that the comment about wanting

Alexandra to be his wife was "motivated by an unnatural or abnormal sexual interest in the child." (See *Mauer, supra*, 32 Cal.App.4th at p. 1130 [closing argument to jury relevant to prejudice determination].) The record does not support an inference that defendant was suffering grief after a divorce or spouse's death when he showed Alexandra the picture and was only interested in marrying Alexandra decades later when she was an adult.

We find no evidence in the record that would support finding defendant did *not* have an unnatural or abnormal sexual interest in Alexandra. The evidence of unnatural or abnormal sexual interest was overwhelming and no rational juror could come to a different conclusion. Accordingly, the instructional error regarding count 3 is harmless beyond a reasonable doubt. (*Mil, supra*, 53 Cal.4th at p. 417.)

IV. DISPOSITION

The judgment is affirmed.

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SEIGLE, J.*

We concur:

BAKER, Acting P. J. MOOR, 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.