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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JESSE JAMES PALATO,<br><br>Defendant and Appellant. | B266846<br><br>(Los Angeles County Super. Ct. No. GA094450) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Stan Blumenfeld, Judge. Affirmed with directions.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesse James Palato appeals from the judgment entered following his convictions by jury for annoying or molesting a child (count 3), contacting a minor to commit a lewd act (count 4), and attempting to arrange a meeting with a minor for a lewd purpose (count 7). These charges arose from appellant's communications with two young boys via the Facebook social media application: count 3 involved 11-year-old victim F.H., while counts 4 and 7 involved 13-year-old victim A.M. At trial, evidence was admitted that appellant engaged in similar Facebook communications with the mother of a third boy, eight-year-old D.R., believing that appellant was communicating with D.R.

Appellant claims that the trial court erroneously instructed the jury as to how it should consider evidence of an uncharged sexual offense of "attempting to annoy or molest" D.R. in deciding appellant's guilt as to the charged offenses. Appellant also contends there was insufficient evidence to support his conviction for annoying and molesting F.H. Finally, appellant contends (and the Attorney General concedes) that the abstract of judgment should be corrected to reflect that appellant was convicted by jury, not by plea. We affirm the judgment of conviction, but order the trial court to amend the abstract of judgment to state that appellant was convicted by jury.

***PROCEDURAL AND FACTUAL SUMMARY***

**1. Relevant Pretrial Procedural History.**

An amended information filed on July 7, 2015, charged appellant with four counts: annoying and molesting a minor, F.H. (Pen. Code, § 647.6, subd. (a)(1)[1] (count 3)); contacting minor

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[1] Unless otherwise indicated, section references are to the Penal Code.

A.M. with the intent to commit a sexual offense (§ 288.3, subd. (a) (count 4)); attempting to arrange to meet minor A.M. for lewd purposes (§§ 664/288.4, subd. (a)(1) (count 7)); and engaging in molesting or annoying conduct with an adult, believing that the adult was minor D.R. (§ 647.6, subd. (a)(2) (count 8)). That final count, count 8, was newly alleged in this amended information filed less than a week before trial was set to begin.

Appellant, who by then was representing himself, orally moved under section 995 to dismiss the new count 8, involving the minor D.R. The court dismissed count 8, finding that it was not timely charged, but granted the prosecution's request that "the evidence in relation to that count be allowed as Evidence Code section 1108 evidence at the trial, as a violation of Penal Code section 647.6(a)(2)."[2] Thus, after conducting the required Evidence Code section 352 analysis weighing the probative value of the evidence versus its prejudicial effect, the court admitted the evidence underlying the dismissed count 8 as "evidence of the defendant's commission of another sexual offense" pursuant to Evidence Code section 1108, subdivision (a). Appellant did not object to the admission of the evidence with respect to his Facebook communications with D.R. or D.R.'s mother.

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[2] Subdivision (a)(2) of section 647.6 provides that "[e]very person who, motivated by an unnatural or abnormal sexual interest in children, *engages in conduct with an adult* whom he or she *believes to be a child* under 18 years of age, which conduct, if directed toward a child under 18 years of age, would be a violation of this section, shall be punished . . . ." (Italics added.)

**2. Evidence at Trial.**

Appellant represented himself during the six-day jury trial. Prosecution witnesses included the three minor boys, F.H., A.M., and D.R., as well as F.H.'s older sister and D.R.'s mother. Appellant presented no defense witnesses.

**(a) Count 3: Victim F.H. (Including June 2012 Events).**

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established as follows. F.H. was born in November 2000. During the events pertaining to count 3, F.H. was 11 years old and in the sixth grade at a Baldwin Park elementary school. Appellant was a basketball coach at his school.

F.H. had a Facebook account. Appellant sent him a "friend request" on Facebook and F.H. accepted. Besides adult family members, appellant was the only other adult with whom F.H. was "friends" on Facebook. The communications below between F.H. and appellant were private messages between appellant's and F.H.'s Facebook accounts. The actual misspellings and abbreviations used in those messages are reflected below.

Appellant began sending F.H. messages in April 2012. Initially, F.H. and appellant conversed about general topics such as basketball and movies. On June 1, 2012, apparently after F.H. was not responsive to his messages, appellant sent him a message stating, "Did I do sumthing to u?? [¶] R u emo???"[3] Appellant sent another message asking, "U have a gf [F.H.]??" (F.H. testified that "gf" meant "girlfriend.") F.H. replied, "[Y]es

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[3] F.H. testified that he did not really know what "emo" meant.

bye[.]" Appellant said, "Lol. . . . jus wondering[.] [¶] Ur weird . . . bye[.] [¶] Nd quit wearing black all the time. [¶] Nd sweaters[.] [¶] Its summer time."

On June 6, 2012, appellant asked F.H., "R u gay? Jus askin . . . . [¶] R u?? [¶] I guess u r." Appellant then said, "R U??? [¶] U kno silence tells alot. [¶] Nd I kno ur emo." F.H. finally replied, "[S]top sending me messages plz." However, appellant continued, "Y u cnt answer the question. Jus tell me . . . ur gay right??? Between [u and me] . . . . [¶] Nd you lied to me . . . u dnt have a gf." F.H. did not respond. Less than 24 hours later, appellant wrote, "Hey its me again[.] [¶] . . . [¶] R u gay or bi or curious? I know you [don't have] a GF[.] I guess u r. . . i'll quit askin. . . I kno the [answer] . . . it's against GOD, u kno. . . ."

F.H. testified it made him uncomfortable when appellant repeatedly asked if he was gay or curious. F.H. stopped going to basketball games as a result. F.H. testified that, due to appellant's Facebook messages, F.H. was afraid of him and thought he would try to do something bad to F.H., "like rape" him.

F.H.'s older sister, Kimberly C. (Kimberly), noticed appellant's messages on her brother's Facebook account. From appellant's photograph on his Facebook account, she concluded that he was over 30 years old. Kimberly, pretending to be F.H., began communicating with appellant on Facebook to gather information, because she found the messages bizarre and very inappropriate. Kimberly eventually revealed to appellant that she was F.H.'s older sister. She asked appellant what a person of his age had in common with an 11-year-old boy. She also asked if it was not weird for appellant to be conversing so much, and "in

such a way," with an 11-year-old boy. Appellant did not respond. Kimberly and F.H. reported the matter to the police.

**(b) Counts 4 and 7: Victim A.M. (Including July 2014 Events).**

A.M. was born on July 5, 2001. During the events pertaining to counts 4 and 7, A.M. attended the same school as F.H., and appellant was A.M's school basketball coach. A.M. had a Facebook account. Appellant sent him a friend request and A.M. accepted. The communications below between A.M. and appellant were private messages via Facebook.

Initially, appellant and A.M. conversed about basketball. On July 4, 2014, appellant, who owned a fireworks stand, told A.M. that he would give A.M. free fireworks. However, appellant later said A.M. "had to let [appellant] fuck [A.M.]" to get the fireworks.

On July 14, 2014, appellant wrote to A.M., "Hey, way. Let me hit. LOL." Appellant asked if A.M. wanted to go to a movie. A.M. made arrangements with appellant to meet him on July 19, 2014, to see a movie. A.M. later said he could not go because he had to go to Mexico. Appellant said, "Let me hit on Thursday." A.M. replied, "Maybe." Appellant said, "I'm serious, foo. Don't play. See if you can go to the movies on Thursday." A.M. testified that he told appellant he would go because he wanted the fireworks, but he did not actually intend to go. Appellant later said, "Left [*sic*] me hit that." A.M. testified that meant, "[h]e wanted to fuck me." Appellant subsequently said, "Nah, we go to the movies on Thursday and after let me fuck you. Or just let me fuck you." A.M. said he needed to buy fireworks, but appellant said, "Yeah. But let me fuck you first" and repeatedly said, "Let me hit first." Appellant later stated, "[B]end over for

me on Thursday before you go to Mexico." A.M. testified that at first he felt appellant was joking, but after several times it "just felt weird" and A.M. blocked appellant from his Facebook account.

**(c) Uncharged Sexual Offense Evidence: Victim D.R. (Including February 2014 Events).**

D.R. was born in March 2005 and, when he was eight years old, he lived in Baldwin Park. D.R. would play with his friend Jose at Jose's house. D.R. met appellant there. D.R. would often talk to appellant about baseball and basketball when he was at Jose's house. Appellant would play basketball with D.R. and Jose at a neighborhood church.

D.R. had a Facebook account and, when appellant asked, D.R. told him his Facebook user name. Appellant sent him a friend request on Facebook and D.R. accepted. Janette R. (Janette), D.R.'s mother, monitored D.R.'s Facebook account.

In February 2014, when D.R. was still eight years old, appellant sent D.R. a message that asked, "Where's your mom and dad?" Janette saw the message and, in an effort to obtain information, she pretended to be D.R. and communicated with appellant on D.R.'s Facebook account for three consecutive days. The communications below between appellant and Janette (posing as D.R.) were private messages between the two Facebook accounts.

On February 23, 2014, appellant asked, "Anyone watching you?" and said, "I'm coming to your house." Appellant said, "I want to tell you something." Appellant again asked, "[I]s there anyone watching you?" Janette, as D.R., replied "yes."

On February 24, 2014, appellant asked if D.R. could keep a secret. Janette said yes. Appellant asked if anyone was with D.R. Janette indicated no. Appellant said he was serious and Janette said she was too. Appellant said he could not tell D.R., and said, "never mind." Appellant then wrote that D.R. might not like what he told him, "might tell," and would probably get mad at appellant. Appellant also said he could get into trouble. Appellant expressed concern that he did not know that no one was with D.R. and he could not be sure he was really talking to D.R. Janette responded, "They're in the living room watching TV and my dad is taking a shower." Appellant said he would tell D.R. his secret when D.R. came over that weekend.

Appellant then asked, "What if I told you I want you to do something fore [*sic*] me?" Janette, as D.R., said he would do it. Appellant said, "I want you to -- never mind. I can't say it." "Because it's wrong." Appellant said, "I want to do something to you." Appellant then wrote, "I want to touch your butt." Janette responded "LOL," but appellant replied he was serious. Appellant asked if D.R. would "let" appellant, and Janette replied yes. Appellant asked, "Can I put my finger in your butt?" Janette replied, "LOL. You're funny." Appellant asked, "Can I?" Janette said no and it would hurt. Appellant said he would be gentle.

Janette was angry but after consulting with her husband decided to continue the ruse. She replied "no" to appellant's last message. Appellant said D.R. was mad at appellant. Janette denied it but said, "I don't want to talk about that." Janette later said, "I don't think anybody likes the finger up their butt. LOL." Appellant replied, "Hey, delete the messages, okay?" Appellant asked if D.R. would do something else for appellant, but

appellant said, "never mind." Appellant said, "Because if you won't let me put my finger, then you won't do this." Janette told appellant goodbye. Appellant said goodbye, and told D.R. to delete all the messages, "don't tell anyone," and "message me when you're done and no one is with you."

On February 25, 2014, appellant wrote, "I love you my little friend." Janette printed the above messages and gave them to the police.

**(d) Additional Investigation.**

On September 2, 2014, police arrested appellant. A search of a cell phone found on his person showed contacts with pornographic websites involving sexual abuse of young boys, and contact with a website with the subject "ever had a creepy [pedophile] teacher." The phone also contained a photograph of A.M.

Police searched appellant's home and found three additional cell phones. One contained a downloaded pornographic video involving young boys and reflected Internet searches for pornographic photographs of children and teenagers and pornographic stories about boys. Another cell phone reflected Internet searches of "Kidslivesafe.com," a website teaching parents how to keep kids safe from pedophiles and sex offenders.

**3. Pertinent Jury Instructions.**

Midway through trial, the court and parties discussed the proposed jury instructions. As to count 3, the court proposed to give CALCRIM No. 1122, which defined the offense of "annoying or molesting a child." The instruction stated: "The defendant is charged in Count 3 with annoying or molesting a child. To prove that the defendant is guilty of this crime, the People must prove

that: [¶] 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 is not necessary that the child actually be irritated or disturbed. It is also not necessary that the child actually be touched." Neither the prosecution nor appellant posed any objection to the proposed instruction.

As to the uncharged sexual offense evidence involving D.R. that was admitted under Evidence Code section 1108, the court proposed to instruct the jury with CALCRIM No. 1191. That instruction, modified to fit the facts, stated: "The People presented evidence that the defendant committed the crime of attempting to annoy or molest a child (*i.e.*, [D.R.]) that was not charged in this case. This crime is defined for you in the next instruction (see Instruction 1191.5 below). [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit

the crimes of Annoying or Molesting a Child, Contacting Minor with Intent to Commit a Lewd Act, and Attempt to Arrange Meeting with Minor for Lewd Purpose, as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of [the above three crimes]. The People must still prove each charge beyond a reasonable doubt."

The court indicated that it had "made up" a companion instruction, No. 1191.5, to instruct the jury on the offense of "attempting to annoy or molest a child," which the court indicated it understood to be "the predicate crime that you're proceeding under for [Evidence Code section] 1108 purposes." The prosecutor agreed that the trial court correctly identified the uncharged sexual offense as attempted annoying or molesting a child. Appellant did not object.

The proposed instruction No. 1191.5 stated: "To prove that the defendant is guilty of the crime of attempted annoying or molesting a child, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing the crime of Annoying or Molesting a Child; AND [¶] 2. The defendant intended to commit the crime of Annoying or Molesting a Child. [¶] . . . [¶] To decide whether the defendant intended to commit the crime of Annoying or Molesting a Child, please refer to the separate instructions that I will give you on that crime (see Instruction No. 1122 . . . )."[4] The instruction further defined a

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[4] CALCRIM No. 1122, set forth above, thus defined the offense of annoying or molesting a child both for purposes of count 3 involving F.H. *and* for purposes of the uncharged offense of attempting to annoy or molest D.R.

"direct step" necessary to find a defendant guilty of attempt. The parties indicated they had no objection to these instructions regarding the uncharged sexual offense.

At the close of the evidence, prior to instructing the jury, the trial court told the parties that it had framed the uncharged sexual offense as an "attempted annoy and molest" charge. The court explained, "There is no CALCRIM instruction with respect to the 647.6, subsection (b), and so it seems to me it makes no difference one way or the other. It gets more complicated if I try to render myself what the elements might be of a (b)(1) [*sic*]." The parties agreed.

Although the trial court referred to section 647.6, *subdivision (b)*, it appears the trial court intended to refer to *subdivision (a)(2)* of section 647.6. Subdivision (b) is not relevant here, as that provision simply makes a violation of section 647.6 a felony instead of a misdemeanor when the defendant "entered, without consent, an inhabited dwelling house, or trailer coach . . . , or the inhabited portion of any other building." No evidence was presented that appellant entered any such place in connection with his asserted uncharged offense against D.R.

Subdivision (a)(2) of section 647.6, which is the section we conclude the trial court must have intended to reference, provides, "Every person who, motivated by an unnatural or abnormal sexual interest in children, *engages in conduct with an adult whom he or she believes to be a child under 18 years of age*, which conduct, if directed toward a child under 18 years of age, would be a violation of this section, shall be punished . . . ." (Italics added.) Thus, it appears that the trial court, with the agreement of both the prosecution and appellant, framed the uncharged offense as "attempting to annoy and molest a child"

pursuant to section 647.6, subdivision (a)(1), rather than as the completed offense, pursuant to section 647.6, subdivision (a)(2), of engaging in annoying and molesting conduct with an adult whom appellant believed was a minor.

During the final charge to the jury, in instructing as to the requirement of proof beyond a reasonable doubt, the trial court specially instructed the jury as follows: "I am going to explain to you that you heard some evidence regarding [D.R.] and his mother that relates to an uncharged offense. And I'm going to explain to you that evidence and how to evaluate it. And you'll see there is a different burden of proof with respect to that uncharged offense with regard to whether you can actually consider it. But don't lose sight of the fact, I don't want this to be confused, that with regard to the three charges in the case that I will get to later on, all of those carry the same burden of proof, proof beyond a reasonable doubt."

The court also instructed the jury with the agreed-upon CALCRIM Nos. 1122 and 1191, as well as with the court's Instruction No. 1191.5, without objection from the parties.

## *DISCUSSION*

### 1. The Court's Jury Instructions Regarding the Uncharged Sexual Offense Were not Erroneous.

At trial, evidence of appellant's Facebook communications with D.R.'s mother, posing as D.R., was admitted pursuant to Evidence Code section 1108 as evidence of an uncharged sexual

offense committed by appellant.[5] Appellant challenges the instructions that were provided to the jury regarding how they could consider and rely upon this evidence in assessing appellant's culpability as to the three charged offenses.

*A. Objections on Constitutional Grounds to Instructions*

Appellant asserts that instructing the jury with CALCRIM No. 1191, the pattern instruction implementing Evidence Code

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[5] Evidence Code section 1108 provides: "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] [s]ection 352." "Sexual offense" is defined to include "[a]ny conduct proscribed by Section . . . 647.6, of the Penal Code" (Evid. Code § 1108, subd. (d)(1)(A)) and includes "[a]n attempt . . . to engage in conduct described in this paragraph." (Evid. Code § 1108, subd. (d)(1)(F).) Evidence Code section 1108 thus constitutes an exception to Evidence Code section 1101, the general rule excluding propensity evidence. Indeed, "[b]y removing the restriction on character evidence in section 1101, section 1108 . . . 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*' [citation], subject only to the prejudicial effect versus probative value weighing process required by [Evidence Code] section 352." (*People v. Britt* (2002) 104 Cal.App.4th 500, 505 (*Britt*).) Furthermore, evidence of *subsequently* committed sexual offenses may also be admitted pursuant to Evidence Code section 1108. (*People v. Cordova* (2015) 62 Cal.4th 104, 133 (*Cordova*) ["The fact that defendant committed two sex offenses against young children *after* the crime in this case permits the logical conclusion that defendant had a propensity to commit sex offenses against young children earlier in his life . . . ."]; *People v. Medina* (2003) 114 Cal.App.4th 897, 903.)

section 1108, "violated appellant's due process rights because [CALCRIM No. 1191] expressly tells the jury it may infer the defendant's guilt of the charged offenses if it finds, based on evidence of another sexual offense, the defendant is predisposed to commit such crimes." He also argues that "instructing the jury it may infer the defendant was likely to commit the charged offense, if the jury finds by a preponderance of the evidence that he committed other similar offenses, violates a defendant's due process right to proof, beyond a reasonable doubt, of all elements of the charged offense."[6]

It is well settled that instructing a jury with CALCRIM No. 1191 as to uncharged sexual offenses does not violate a defendant's right to due process or a fair trial. In *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), our Supreme Court concluded that the predecessor to CALCRIM No. 1191, CALJIC No. 2.50.01, properly permitted the jury "to infer the defendant has a disposition to commit sex crimes from evidence the defendant has committed other sex offenses" (*id.* at p. 1012), and in turn to infer from this predisposition that the defendant was likely to commit and did commit the charged offense. (*Id.* at

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[6] We reject respondent's claim that appellant waived these issues by failing to object below. "[A] defendant need not object to preserve a challenge to an instruction that incorrectly states the law and affects his or her substantial rights." (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156 (*Palmer*); see *People v. Salcido* (2008) 44 Cal.4th 93, 155 ["[b]ecause defendant contends the instruction reduced the prosecutor's burden of proof, thus affecting one of his fundamental constitutional rights, we entertain the claim on its merits" despite defendant's failure to object below].)

p. 1013.) *Reliford* also concluded that the fact the uncharged offense needed to be proven only by a preponderance of the evidence did not lessen the People's burden to prove the charged sexual offense beyond a reasonable doubt, where the instruction told the jury that a finding that the defendant committed the uncharged offense was insufficient by itself to prove beyond a reasonable doubt that the defendant committed the charged sexual offense. (*Id.* at pp. 1015-1016.)

Appellate courts have likewise uniformly held that CALCRIM No. 1191, which is not materially different from its predecessor CALJIC No. 2.50.01, is constitutionally sound as to its instructions regarding consideration of uncharged sexual offenses, and it does not lower the prosecution's burden of proof as to the charged offenses.[7] (See, e.g., *People v. Anderson* (2012) 208 Cal.App.4th 851, 895 (*Anderson*); *People v. Cromp* (2007) 153 Cal.App.4th 476, 479–480; *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [rejecting constitutional challenge to CALCRIM No. 1191 because "[t]he version of CALJIC No. 2.50.01 considered in *Reliford* is similar in all material respects to . . . CALCRIM No. 1191 . . . in its explanation of the law on permissive inferences and the burden of proof."]; cf. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1185 [use of CALJIC No. 2.50.01 improperly lowered prosecution's burden of proof where the

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[7] In fact, the CALCRIM No. 1191 instruction given in the present case was more favorable to appellant than CALJIC No. 2.50.01 was to the defendant in *Reliford*, because, unlike the latter instruction, the CALCRIM No. 1191 instruction stated, "If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence."

preponderance standard was applied to determine whether defendant committed *charged* offenses for the purpose of deciding whether he had a propensity to commit sexual offenses].) Further, we note that the trial court here took extra care to ensure that the jury understood that the prosecution needed to prove appellant's guilt as to the charged offenses beyond a reasonable doubt, notwithstanding the different burden of proof for the uncharged offense. In addition to giving CALCRIM No. 1191, the court told the jury, "And you'll see there is a different burden of proof with respect to that uncharged offense . . . . But don't lose sight of the fact, I don't want this to be confused, that with regard to the three charges . . . , all of those carry the same burden of proof, proof beyond a reasonable doubt."

Although appellant acknowledges that *Reliford* and subsequent authority likely foreclose his constitutional claim, and he emphasizes that he makes this claim to preserve the constitutional issues for federal review, he also suggests that *Reliford* is "factually distinguishable" due to the "unique circumstances of this case." Appellant does not explain what he believes makes this case unique, except to say that here "the jury was presented with different standards of proof for their findings." The circumstance of different standards of proof for the uncharged and charged offenses, however, was present in *Reliford* and, as discussed above, was the key issue addressed by the court. (*Reliford, supra,* 29 Cal.4th at pp. 1015-1016.) We are unable to discern any ways in which the instant case is materially distinguishable from *Reliford*.[8]

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[8] We emphasize that *Reliford*, like the case before us, involved the use of uncharged offenses to show propensity, not charged offenses.

"Reviewing the instructions as a whole, and assuming jurors are capable of understanding and correlating jury instructions [citation], there is no reasonable likelihood the instruction on uncharged offenses relieved the prosecution of its burden of proof with respect to the charged offenses." (*Anderson, supra*, 208 Cal.App.4th at p. 896.) Further, we conclude appellant's constitutional rights were not violated when the jury was instructed with CALCRIM No. 1191 that it could infer from appellant's commission of an uncharged sexual offense that he was likely to commit the charged offenses.

*B. Other Alleged Instructional Errors*

Appellant also suggests that CALCRIM No. 1191 and Instruction No. 1191.5 were confusing and did not enable the jury to properly assess the significance of the evidence of the uncharged sexual offense involving D.R. Appellant waived his objection as to the allegedly confusing nature of the instructions by failing to request clarifying or amplifying instructions. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192 ["if defendant believed the instruction was unclear, he had the obligation to request clarifying language"]; *Palmer, supra,* 133 Cal.App.4th at p. 1156.) Even if his argument were not forfeited, we conclude that CALCRIM No. 1191, Instruction No. 1191.5, and CALCRIM No. 1122, read together, were sufficiently clear to enable the jury to determine whether appellant had committed the uncharged offense and to advise the jury of the appropriate ways to rely on his commission of that offense.

Appellant takes issue with the fact that the trial court "made up" Instruction No. 1191.5 to instruct the jury on the offense of "attempting to annoy and molest" a child, in violation of sections 664 and 647.6, subdivision (a)(1). The evidence

demonstrated that appellant's Facebook communications relating to this uncharged offense were with D.R.'s mother, Janette, who was logged in on Facebook as D.R. and pretending to be him in communications with appellant. As the trial court acknowledged, this conduct could have been considered a violation of section 647.6, subdivision (a)(2), as appellant clearly was "engag[ing] in conduct with an adult whom he . . . believe[d] to be a child under 18 years of age" (§ 647.6, subd. (a)(2).) Indeed, as discussed above, the prosecutor had unsuccessfully attempted to add a count under subdivision (a)(2) as to D.R. Thus, the jury could have been instructed with the elements of that uncharged offense. However, appellant did not argue below, and does not argue on appeal, that the trial court erred in instructing the jury on "attempted annoying and molesting a child" under section 647.6, subdivision (a)(1) as the "uncharged offense" in lieu of instructing on the elements of the completed subdivision (a)(2) offense applicable when a defendant is engaging in conduct with an adult he believes is a child.

Attempting to annoy or molest a child is plainly a cognizable offense. (See *In re McSherry* (2007) 157 Cal.App.4th 324, 327-328.) Under the facts here, appellant could not be guilty of the *completed* act of "annoying or molesting" D.R., because he was in fact communicating with D.R.'s mother, not D.R. Although he was thwarted from his attempt to "annoy or molest" D.R. because D.R.'s mother intercepted his communications, it is plain that he *intended* to direct, and *believed* he was directing, his Facebook messages to D.R., and thus an instruction on attempting to annoy or molest a child was supported by the evidence.

We find support in *People v. Reed* (1996) 53 Cal.App.4th 389 (*Reed*). In *Reed*, the defendant was convicted of one count of attempted molestation of a child under the age of 14 years pursuant to sections 664 and 288, subdivision (a). The defendant had believed he was corresponding in writing with "Helen," who represented that she was the mother of two girls, ages 12 and nine, when in reality the defendant was corresponding with a sheriff's detective investigating crimes against children. The defendant's correspondence with "Helen" progressed to the point that he formulated a plan with "Helen" for him to engage in sexual activities with the two minor girls. When he showed up at their arranged meeting at a hotel room expecting to carry out this plan, he was arrested. (*Reed,* at pp. 393-395.)

The defendant in *Reed* argued that " 'there can be no attempt to commit child molestation where the victim is imaginary because appellant could not fulfill all of the elements of the offense.' " (*Reed, supra,* 53 Cal.App.4th at p. 396.) The appellate court rejected that argument, finding that " 'factual impossibility is not a defense to a charge of attempt.' " (*Ibid.*) "[I]f the circumstances had been as defendant believed them to be, he would have found in the room he entered two girls under fourteen available for him to engage in lewd and lascivious conduct with them. Defendant's failure to foresee that there would be no children waiting does not excuse him from the attempt to molest." (*Id.* at p. 397; see also *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 177, 185-187 (*Hatch*) [where defendant believed he was communicating on the Internet with a 13-year-old girl, but she was actually a 20 year old posing as a minor, he was properly convicted of attempted seduction of a minor under §§ 664 and 288.2, subd. (a), even though he could

not be convicted of the completed crime because there was no actual victim under age 14].) Likewise, because appellant "had the specific intent to complete the target crime[], the impossibility of completing the crime[] does not exonerate him from attempting" the offense of molesting or annoying D.R. (*Hatch,* at pp. 185-186.) Accordingly, we find no error in the trial court's instruction on the uncharged offense of attempting to annoy or molest a child.

**2. Sufficient Evidence Supports Appellant's Conviction on Count 3.**

Appellant contends there is insufficient evidence supporting his conviction for annoying or molesting a child (F.H.) under 18 years old (count 3). We reject his claim.

"In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt. [Citation.] 'The record must disclose substantial evidence to support the verdict–i.e., evidence that is reasonable, credible, and of solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] In applying this test, we review the evidence in the light most favorable to the verdict and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. . . . [W]e may not reverse for insufficient evidence unless it appears ' "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' [Citation.]" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1157 (*Valenti*).)

A violation of section 647.6, subdivision (a)(1) "requires proof of the following elements: (1) the existence of objectively

and unhesitatingly irritating or annoying conduct; (2) motivated by an abnormal sexual interest in children in general or a specific child; (3) the conduct is directed at a child or children, though no specific child or children need be the target of the offense; and (4) a child or children are victims." (*People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396, fn. omitted; see *Valenti, supra,* 243 Cal.App.4th at p. 1161.)

In his opening brief, appellant specifically focuses his argument on the second element set forth above, arguing there was insufficient evidence admitted at trial to prove that his conduct was motivated by an unnatural or abnormal sexual interest in the child F.H. Appellant suggests that in order to satisfy the intent element of section 647.6, his outward conduct itself must have been *explicitly* sexual, and "strong sexual overtones" are not enough. He relies on *People v. Kongs* (1994) 30 Cal.App.4th 1741 (*Kongs*), in which the court held that "[f]or the most part, Penal Code section 647.6 has been applied to incidents of explicit sexual conduct." (*Id.* at p. 1750.) However, appellant omits the portion of *Kongs* in which the court noted that "[i]n some instances . . . the proscribed conduct was more ambiguous." (*Ibid.* [on review of § 995 order, finding sufficient evidence to support magistrate's finding of probable cause to support § 647.6 charge].)

The private Facebook messages forming the basis for count 3 feature appellant, who was an adult basketball coach at F.H.'s school, repeatedly inquiring of F.H., an 11-year-old boy, if he was "gay" or "curious." When F.H. did not respond, appellant told F.H. that appellant guessed F.H. was gay. Appellant continued questioning F.H. about whether he was gay and suggested that F.H.'s silence was tantamount to an admission that he was gay.

In determining whether appellant's harassing Facebook messages to F.H. were motivated by a sexual interest in F.H., the jury was not limited to examining the content of the messages between appellant and F.H. Rather, the jury was entitled to consider evidence of appellant's sexual interest in other children. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 494) [competent evidence of defendant's prior molestation offenses tended to show that when he touched the child victim he was motivated by a sexual interest in the child in violation of § 647.6]; see *People v. Memro* (1995) 11 Cal.4th 786, 864 [evidence that defendant possessed child pornography tended to show his motive and intent to perform a lewd act on a young child in violation of § 288]; *People v. Herman* (2002) 97 Cal.App.4th 1369, 1390 [defendant's intent to commit lewd and lascivious act on minors "was apparent not only from his words and conduct toward the four victims of the attempt charges but also from evidence of a long history of pedophilic interests and conduct"].)

Here, evidence was admitted that appellant sent Facebook messages to a person he believed was eight-year-old D.R., stating that appellant wanted to "touch [D.R.'s] butt" and "put [his] finger in [D.R.'s] butt." The jury was permitted to consider evidence of this uncharged offense for " '*any relevant purpose*,' " including appellant's sexual intent as to F.H. (*Britt, supra*, 104 Cal.App.4th at p. 505; see *Cordova, supra,* 62 Cal.4th at p. 133 [sex offenses committed after charged act may be considered by jury].) Further, evidence was also introduced that appellant visited websites featuring child pornography and his cell phone contained a downloaded pornographic video involving young boys.

Particularly considering the evidence introduced at trial of appellant's aberrant sexual interest in young boys, we hold there was sufficient evidence to convince a trier of fact, beyond a reasonable doubt, that appellant's conduct towards F.H. was motivated by an unnatural or abnormal sexual interest in F.H. Thus, we affirm appellant's conviction for annoying or molesting F.H.[9]

**3. The Abstract of Judgment Must Be Amended.**

The abstract of judgment erroneously reflects that in this case appellant was convicted by plea. We accept respondent's concession that the abstract must be amended to reflect appellant was convicted by jury (cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466, fn. 3) and we order the trial court to amend the abstract accordingly.

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[9] In his reply brief, appellant argues for the first time that the prosecution failed to adduce sufficient evidence as to the separate element under section 647.6, subdivision (a)(1) of "conduct that would unhesitatingly disturb or irritate a normal person." Appellant's opening brief not only does not dispute the sufficiency of the evidence as to this element, but also nearly concedes that this element was established, stating "[a]lthough these communications may have been disturbing, irritating, or offensive, they were insufficient to support the prosecution's theory that appellant's conduct was motivated by an 'unnatural' or 'abnormal sexual interest' in [F.H.]." Because appellant raises the argument as to this additional element for the first time in his reply brief, we consider it forfeited and do not address it. (*People v. Senior* (1995) 33 Cal.App.4th 531, 537.) The argument is also forfeited because appellant failed to develop it with reasoned legal argument and supporting authority. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

## *DISPOSITION*

The judgment is affirmed. The trial court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting appellant was convicted by jury, not by plea, in this case.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

STONE, J.*

We concur:

EDMON, P. J.

LAVIN, 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.