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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALLEN FRENCH, Defendant and Appellant.	B250765 (Los Angeles County Super. Ct. No. VA122968)

APPEAL from a judgment of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Reversed with directions.

Jessica C. Butterick, 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, Senior Assistant Attorney General, David Zarmi and Andrew Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Allen French appeals from the judgment entered following a jury trial in which he was convicted of felony child molesting in violation of Penal Code section 647.6[1] and misdemeanor assault and battery. Defendant raises several contentions, including error created by the trial court's conflicting instructions on proof of his motivation and sufficiency of evidence. We conclude the trial court erred by instructing the jury that the prosecutor need not prove defendant's motive because motivation is an element of a violation of section 647.6. We further conclude the error was not harmless beyond a reasonable doubt because defendant's motivation was contested and the evidence on this point, while sufficient to support a jury finding that defendant acted with the requisite motivation, was not overwhelming. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

1. The events of December 25, 2011

On December 25, 2011, 12-year-old Vanessa went to a family Christmas party with her mother and three younger siblings. Defendant, who was their distant cousin, aged 64, was also present at the party, but neither Vanessa nor her mother had met him previously.

Defendant drank liquor and danced with some of the women at the party. While everyone was seated at the dining room table, he conversed with Vanessa. She told him she had received a "C" in one of her classes, and he encouraged her to keep her mind on school, do better, and not let boys take advantage of her. Vanessa's mother testified that defendant was polite and respectful to Vanessa, did not touch her inappropriately, and that the conversation did not seem unusual. Defendant hugged Vanessa a number of times.

Later, when Vanessa was alone in the kitchen, defendant approached her and resumed talking to her. She was throwing away trash at the time, and defendant

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[1] Undesignated statutory references are to the Penal Code.

"banged" on her upper chest with his fists to get her attention. Defendant continued to talk to her, took her wrist and led her outside to some steps in the back yard, just outside the laundry room, and then let go of her wrist. Before they went out, defendant turned off both the light in the laundry room and the light just outside the door to the yard. He then turned the laundry room light back on. There were other lights on in the back yard; it was light enough for Vanessa to see defendant and her two- or three-year-old sister, who had followed them outside. Throughout the party, the children in attendance had been in and out of the yard, playing together and with the dog that lived there.

Defendant continued the prior conversation about Vanessa working harder to do well in school. He did not tell her she had to stay outside. He moved closer to her, causing her to back away. He gently touched her cheek and leaned in to kiss her, but she moved her head from side to side, and the kiss landed on her cheek and one corner of her lips. Vanessa testified the kiss was closed-mouth and lasted "like a second." Defendant hugged her and said, "'I love you, even if I never see you again.'" Vanessa was shocked and felt awkward. She backed away from defendant. Vanessa's seven-year-old brother came outside, and defendant hugged him and spoke to him also. Her brother went back inside and defendant continued to talk to Vanessa. Eventually, defendant took out his cigarettes and said, "'You can go.'"

Vanessa went back inside and told one of her sisters and her mother about what had happened. Vanessa's mother testified that Vanessa looked nervous and scared, and began to cry as she told what had happened. Vanessa's mother and several of her male relatives confronted defendant, who seemed offended and repeatedly said he had merely talked to Vanessa about school. After the party host told defendant to leave, defendant sat outside the house in his vehicle.

Sheriff's Deputy Nicole Carballo responded to the home and interviewed Vanessa, who was crying and difficult to understand. Carballo testified that Vanessa said defendant had placed both of his hands on her cheeks to hold her head as he leaned in to kiss her. Defendant, who had remained at the scene, told Carballo he had only spoken to

Vanessa about school, had never been alone with her, and had had no physical contact with her.

2. Charges, verdicts, and sentencing

Defendant was charged with committing a lewd act on a child, assault with intent to commit a sex offense, and child molesting with a prior conviction. The information also alleged he had eight prior serious or violent felony convictions within the scope of the "Three Strikes" law and section 667, subdivision (a)(1). Defendant stipulated to the prior conviction for purposes of the child molesting charge, and the jury convicted defendant of that charge. The jury acquitted him of the other two charges and instead convicted him of the lesser included offenses of misdemeanor battery and assault. Defendant admitted three of the "strike" allegations, and the prosecutor elected not to proceed on the remaining prior conviction allegations.

Defendant moved to dismiss the prior conviction findings so that he could be sentenced more leniently. The court denied the motion and sentenced him to a third-strike term of 25 years to life in prison, with concurrent terms of six months for the misdemeanors.

DISCUSSION

1. Conflicting instructions regarding proof of motivation

a. Proceedings in the trial court

The trial court properly instructed the jury upon the elements of a violation of section 647.6 using CALCRIM No. 1122, which informed the jury that the prosecutor was required to prove that defendant was motivated by an unnatural or abnormal sexual interest in a child. At the request of defense counsel, however, the trial court also instructed the jury, pursuant to CALCRIM No. 370, that "The People are not required to prove that the defendant had a motive to commit any of the crimes charged."

Defendant contends that providing these conflicting instructions violated his right to due process and was not harmless beyond a reasonable doubt. The Attorney General

does not contest defendant's right to raise the issue on appeal and concedes that the trial court erred. She nonetheless argues the error was harmless.

b. Pertinent legal principles

"[A] violation of Penal Code section 647.6, subdivision (a) 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.)

Because the prosecution is required to prove that the conduct of a defendant charged with violating section 647.6 was motivated by an abnormal sexual interest in children or the child victim, a trial court errs by giving an unmodified version of a pattern jury instruction telling the jury that the prosecutor is not required to prove defendant's motive to commit any of the crimes charged, even though the instruction on the elements of the offense correctly states the requirement that the prosecutor prove, inter alia, that the defendant's conduct was motivated by an unnatural or abnormal sexual interest in a child. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.) These conflicting instructions effectively removed the motivation element from the jury's consideration because some jurors could have chosen to follow the instruction that no proof of motive was required, rather than the correct instruction on the elements of the offense. (*Id.* at pp. 1128–1129.) The error therefore was of federal constitutional dimension and is subject to harmless error analysis pursuant to the standard of *Chapman v. California* (1967) 386 U.S. 28, 24 [87 S.Ct. 824] (*Chapman*), that is, reversal is required unless the error was harmless beyond a reasonable doubt. (*Maurer*, at p. 1129.)

The erroneous failure to instruct on one or more elements of a crime is deemed harmless when a reviewing court, after conducting a thorough review of the record, "concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." (*Neder v. United States* (1999) 527 U.S. 1, 17

[119 S.Ct. 1827] (*Neder*).) "*Neder* instructs us to 'conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.' [Citation.] On the other hand, instructional error is harmless 'where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.' [Citations.] Our task, then, is to determine 'whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.' [Citations.]" (*People v. Mil* (2012) 53 Cal.4th 400, 417.)

c. The conflicting motive instructions were not harmless beyond a reasonable doubt

We have thoroughly examined the record and are unable to conclude that the error was harmless beyond a reasonable doubt. At trial, defendant vigorously contested the motivation element of the section 647.6 charge. Defense counsel repeatedly argued that defendant was a socially inept elder giving advice to a younger relative, and while he may have made poor decisions, he was not motivated by any sexual interest in Vanessa or children in general.

The evidence regarding defendant's motivation was far from overwhelming and could rationally have led to a finding that he acted without the requisite abnormal sexual interest in children in general or in Vanessa in particular. While defendant's conduct can reasonably be characterized as inappropriate and even disconcerting, he was Vanessa's relative, the record indicates that all of his conversations with Vanessa were appropriate and respectful, and his misconduct was not clearly beyond the bounds of innocent, affectionate conduct between relatives. He did not, for example, kiss Vanessa with an open mouth or touch her breasts or genitals. After she largely evaded his kiss and backed away, he did nothing to restrain her or attempt another kiss. Indeed, although he led her outside and touched her cheek, she described his touch as gentle, and he did not use any

significant degree of force on her. The record revealed that the children at the party were in and out of the back yard throughout the party. Nothing in the record indicated defendant took any steps to prevent the children or even adults from entering the backyard when he and Vanessa were out there. Indeed, Vanessa's brother joined Vanessa, defendant, and Vanessa's toddler sister soon after the kiss. Although defendant turned off the light near where he and Vanessa were standing, Vanessa testified that the yard was illuminated by other lights that defendant made no effort to extinguish.

As addressed in the next section of this opinion, although we agree the circumstantial evidence was sufficient to support a finding by the jury that defendant acted with the requisite sexual motivation, we conclude that under all of the circumstances, one or more properly instructed rational jurors could have had a reasonable doubt about whether defendant was motivated by an abnormal sexual interest in children in general or in Vanessa in particular. Accordingly, the conflicting motivation instructions in this case were prejudicial and require reversal.

2. Sufficiency of evidence of defendant's motivation

Defendant contends there was insufficient evidence that he was motivated by an abnormal sexual interest in children in general or in Vanessa in particular to support his conviction of violating section 647.6. Because retrial would be precluded if we agreed with defendant, we must address this issue notwithstanding the necessity of reversal for instructional error.

a. Pertinent legal principles

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Tully* (2012) 54 Cal.4th 952, 1006.) Substantial evidence is "'"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."'" (*Ibid*.)

We presume the existence of every fact supporting the judgment that the jury reasonably could have deduced from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) A reasonable inference may not be based solely upon suspicion, imagination, speculation, supposition, surmise, conjecture, or guess work. (*People v. Raley* (1992) 2 Cal.4th 870, 891.) "'"A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."'" (*Ibid.*)

b. The record presents substantial evidence of sexual motivation

Viewing the whole record in the light most favorable to the judgment, we conclude the record provides substantial evidence sufficient to support a finding by a reasonable jury, beyond a reasonable doubt, that defendant's conduct was motivated by an abnormal sexual interest in children in general or in Vanessa in particular. Although Vanessa and defendant were related, they had never met before the party on December 25, 2011. Defendant seemed to focus an undue amount of time and attention upon Vanessa, hugged her repeatedly, "banged" on her chest to get her attention, physically led her outside the house after reducing the lighting at their destination, moved closer to her, touched one or both of her cheeks, and kissed her, apparently aiming for her lips. He then declared his love for her. Although this evidence may not have been compelling, it was sufficient as a whole to permit a properly instructed jury reasonably to infer defendant was sexually interested in Vanessa, and that this interest both motivated his conduct toward her and was abnormal.

Defendant's sufficiency of evidence argument relies in significant part upon CALCRIM No. 224, which instructs the jury that if two or more reasonable inferences can be drawn from circumstantial evidence, one pointing to innocence and the other to guilt, the jury must accept the one that points to innocence. This instruction is solely for the jury's guidance in its fact-finding role; it does not govern appellate review of the sufficiency of evidence. (*People v. Towler* (1982) 31 Cal.3d 105, 118 ["Whether the

evidence presented at trial is direct or circumstantial . . . the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt."].) Instead, we affirm if substantial evidence supports the verdict, even though the circumstantial evidence might be reasonably reconciled with the defendant's innocence. (*Ibid.*)

3. Remaining issues

Given our disposition, defendant's remaining issues, which pertain to sentencing, are moot.

DISPOSITION

The judgment is reversed and the cause is remanded for further proceedings.

NOT TO BE PUBLISHED.

BENDIX, J.*****

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

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