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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID GENE HILL, Defendant and Appellant.	A126089 (San Mateo County Super. Ct. No. SC065890)

A jury convicted David Gene Hill of two misdemeanors—annoying or molesting a child (Pen. Code, § 647.6, subd. (a)(1))[1] and invading the privacy of a bathroom stall (former § 647, subd. (k)(3))—and the court suspended imposition of sentence on each count and granted him three years' supervised probation with a 90-day jail term. The trial court stayed the jail term pending this appeal, in which Hill offers seven reasons why the count of annoying or molesting a child should be reversed, and claims a violation of equal protection for lifetime sex offender registration imposed for that count. (§ 290, subd. (c).)

We reject all of his claims and affirm the judgment.

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[1] All further section references are to the Penal Code.

Section 647.6 provides in subdivision (a)(1): "Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment."

Hill was found not guilty of a felony count of possessing child pornography (§ 311.11, subd. (a)).

I. BACKGROUND

The underlying charges stem from Hill using a digital camera during the noon hour of March 29, 2007, in a bathroom at Sequoia High School in Redwood City, to videotape a 15-year-old high school freshman, identified at trial as John Doe, as Doe finished urinating in a stall next to Hill's.

The high school was hosting a career fair that day for its students, and the cosmetology program at the College of San Mateo was a participant. Hill, a college senior in the program, had volunteered for the event, and program instructional aide Maribeck Boosalis led the volunteers. Hill volunteered when Boosalis already had seven volunteers, more than she needed, but when she told him she had enough students, he prevailed upon her to allow him to go. The fair was held at a gym at the high school, and Boosalis instructed her volunteers to park at a lot next to the gym, to facilitate moving supplies. Hill did the work, earning hourly program credits (8 a.m. to 12:30 p.m.) and hair cutting credit toward his license. He did not park his car in the indicated lot, however, but at one much further away. When the presentation ended early, before noon, Hill helped with the packing and cleanup.

Doe, a 15-year-old freshman, left a basketball game that lunch hour and went into a restroom to urinate. Seeing no one else there and all urinals available, he opted for the privacy of a commode stall—a handicap stall that was the biggest and last of three stalls in a row. He stood at the commode and urinated while making a call on his cell phone. As he finished urinating, and while his penis was still out, he noticed a camera and hand rise above the divider from the center stall, a flash go off, and the hand and camera quickly disappear. Shocked, he "freaked out," zipped up, left his stall and, within four seconds, was pounding on the door to the center stall, yelling for the occupant to get out and give him the camera. Doe swore and kept yelling his demands. The person said: " 'It wasn't me. I don't have a camera.' " No more than a minute after the flash, and after four or five rounds of the demands and denials, the occupant opened the door. It was Hill, whom Doe had never seen before.

Hill rushed out to get past Doe, but Doe grabbed him and pushed him toward the urinals, away from the exit door, still demanding the camera. Hill pushed back at Doe, trying to get away, but Doe had him against a wall and hit him in the face. When Hill fell, Doe got him into a headlock and took him out of the bathroom and to room 26, Mr. Morton's classroom, directly across from the bathroom. Hill, in a very worried voice, kept denying it was him and saying "he had to go back" where he was supposed to be. Morton summoned help, and before security and others arrived, Doe and Hill stayed at opposite ends of the room. Hill, seemingly worried and threatened, kept saying he had to go.

Doe never saw Hill produce a camera. Asked if he thought there was something sexual about being photographed like that, he said the obvious: "Yeah, I did. I mean people don't take pictures while you're going to the bathroom."

"Special ed" teacher William Morton corroborated Doe's account, saying he was having lunch at his desk at about 12:25 p.m., with his aide in the room, when he heard a commotion across the hall, saw the bathroom door fly open, and saw Doe, yelling, with someone in a headlock. Morton directed them into his classroom, closed the door, and kept them separated while the aide summoned help. Pending the arrival of security and two assistant principals, Doe was upset, swearing and yelling that Hill took a picture of him going to the bathroom. Hill held up a cell phone and challenged, " 'Well, check my cell phone.' " Hill was very nervous, "kind of shifty," and kept fiddling with his crotch area, saying he needed to go to the bathroom, had to get to an appointment, and was involved in the job fair.

Administrative Vice Principal David Reiley was among those who went to Morton's classroom. He similarly found Hill to be very nervous, fidgeting with his backpack, pants, belt and pockets, and saying he had to go to an appointment. Reiley eventually persuaded Hill to accompany him to his office to answer some questions. Reiley called the police, put Hill into a waiting room where he could keep an eye on him while they waited and, having determined that Hill was an adult, turned him over to Officer Hurst.

Todd Hurst, a police officer with the City of Redwood City, was the assigned campus officer at the school. He responded to Reiley's call, and spoke just beforehand Doe, who was upset and angry, and told Hurst of Hill taking his picture in the bathroom. Hurst found Hill to be fiddling with the cell phone and, when Hill told Hurst he was deleting text messages and had not taken any pictures, Hurst asked to see the cell phone. Hill said, " 'Go ahead' " and handed it over, but Hurst found no photos of Doe on it. When Hurst asked what kind of text message he deleted, Hill said they were sexual in nature, clarifying that they were homosexual in nature. Hill seemed nervous, anxious and scared throughout the encounter with Hurst.

Hill said he was attacked by Doe for no reason and wanted to file charges for assault, so Hurst gave him an incident report to fill out. Hill wrote that a "kid" had tried to beat him up in the men's room, put an arm around his neck to choke him, and gave him a fat lip. Hill told Hurst he was a cosmetology student giving haircuts on the campus that day, did not understand why he was attacked, and needed to leave and go back to class. Hurst saw that Hill was "fiddling with his pants a lot" but, as he said with embarrassment at trial, he "didn't pick up on that" at the time.

Hurst arrested Hill. Hill told Hurst where he had parked his car, and Hurst drove him there. It was a lot near the entry gate nearest the bathroom in question. That bathroom was also over 600 feet from the gym where the career fair was held, while another boy's bathroom was less than 22 feet from the gym, and still another was midway, some 300 feet away.

Redwood City Police Officer Sharp transported Hill to county jail, the Maguire Correctional Facility, where he turned Hill over to Correctional Officer Abel Ramon Avila for processing. Hill still acted nervous and scared, and a pat search by Avila revealed a metallic heavy object in Hill's groin that seemed to be in his underwear. Avila took a step back and demanded several times that Hill tell what it was and take it out, but Hill denied there was anything there, or said it was "nothing." Advised that it would come out one way or another, Hill protested that they could not "do that," and did not comply. Avila then got assistance from Sergeant Barberini, who also tried to persuade

Hill. After about six denials of having anything, Hill finally relented. He removed the object and handed it to Avila. It was a digital camera, a black Panasonic Lumix.

Avila turned the camera over to Sharp, who took it to Hurst, who then examined its contents. There were about 194 video and still-picture files in all, some possibly depicting classmates of Hill's from the College of San Mateo. Thirty-two, however, were videos taken of males (about 25 different ones) standing at or sitting on commodes in bathroom stalls. Each such video also had a corresponding still-shot file. One video was of Doe, taken in the high school bathroom in question. His and six other videos were viewed by or described for the jury during Hurst's testimony. They were short, and Doe's and the others showing males standing, showed urine flowing from penises or penises being shaken off, presumably after urination. Hurst identified two of the videos as taken in a bathroom at the college.

The high school's 1,600 some students at that time ranged in age from 14 to 18 years old. Perhaps 100 to 150 seniors would have been 18 years old already, but a fair number of seniors attended only half days, and would have left the campus at noon.

Psychiatrist James Missett testified for the People as an expert in paraphilia, which he defined as a preferred or regular, usual way of arousing the sexual interest or achieving sexual gratification. It is a focus on, or interest in, activities, usually but not exclusively sexual, that are different from "normal male/male, female/ female, male/female sexual interacting or courting kind of behavior." "[T]he words 'preferred, regular and usual,' " he explained, "distinguish it from casual or incidental kinds of experiences that people can have." Paraphilia requires some indication that the action is repeated "enough in the way of events to be able to say this is preferred. This is regular. This is usual."

Paraphilias, Missett explained, are wide ranging but include sexual sadism, sexual masochism, frotterism (rubbing against others in a crowded environment), exhibitionism, voyeurism (including viewing pornography), bestiality, watching or listening to others urinate, scatologism (exposure to others, or animals, defecating), or fetishism (touching or exposure to a physical object). A paraphilia also requires behavior to put oneself in

the position to satisfy the attraction; the attraction alone is not enough. The qualifying time period for the interest could be as short as a month but, for purposes of making a diagnosis, should be a year.

Missett had not met or evaluated Hill but viewed 70 video files, including the seven to be shown in court, those being among 32 bathroom-related videos that each had an associated still image. Posed with hypothetical questions that closely tracked the facts of this case, Missett responded that the acts and circumstances were "consistent with" paraphilias of voyeurism, and interest in urination or defecation. He also deemed the conduct "consistent with" voyeurism to the extent that it produced a photograph or video as a more readily available means to find excitement or gratification in the future, or in that holding the viewfinder over the top of the stall allows one to see without sticking his head over the stall.[2] He explained that unusual sexual interest in urination would not necessarily require viewing genitalia, and is commonly satisfied by simply *hearing* the urination. Adding to the hypothetical that the actor self identifies as homosexual was "highly relevant," Missett thought, since that fact, combined with a high proportion of the images being males with genitalia exposed or urinating, is "consistent with the individual having the interest or intent of returning [to view again]." Also "very consistent" and "very significant" was that the person took a camera into the bathroom and used it there.

[2] On cross-examination, Missett explained that by "consistent with," he did not mean "conclusively probative of," but did mean more than just "not inconsistent with": "It means there are aspects to whatever it was that was asked about that basically fill in portions of a portrait without filling in the whole portrait. [¶] So that in the end there's just enough of holes or missing pieces that basically you say it's consistent, but, again, I'm only looking at a very small portion of a much larger picture. And I'm not a judge and I'm not a juror. I come in. I look and I say, 'Well, it's consistent with such and such.' And other people do whatever they do with it." Nor did he mean to "imply" what the full picture was.

Asked if, by saying *consistent with*, he was making a "diagnostic statement," Missett said: "I can't make a diagnostic statement about anybody in this room. Maybe except myself. Inasmuch as I never evaluated or met[,] I don't think[,] anybody in this room before." He stressed, "[B]y and large the rules are you don't make a diagnosis of

Hiding the camera in one's crotch afterward was consistent with embarrassment and an effort to conceal an unusual interest.

Psychologist Alfred Fricke testified for the defense, as an expert in evaluating potential sex offenders. He had met with Hill for three and a half hours total over two occasions in 2008, reviewed the police reports, read a 2007 psychological evaluation of Hill done by Dr. Joanna Berg, had a private investigator interview Hill's boyfriend (unnamed in testimony), interviewed the boyfriend himself for an hour, read a written statement from him, and, just a week before trial, viewed the video clips found on Hill's cell phone and learned that there were 32 videos depicting urination or defecation.

Fricke defined paraphilia as not just an unusual and protracted sexual interest, but one that rules or causes problems for the person or for others. "[A] paraphilia is basically a sexual deviancy or a sexual perversion. Something sexual that has an extra importance in the person's life so that they have a—it's like an obsession with the sexual. That there's some sort of extra power in the sexual thoughts or thinkings. Either their fantasy life thinking or their behaviors that define the paraphilia. Those are the main criteria. It has to be fantasy or behaviors. [¶] And it can't be something that just happened for a short period of time and didn't happen before that and didn't happen after it. It has to be something that's built into you. Something the person has struggled with that's caused a problem for them or someone else. And it's a big source of concern. Either for the person themselves because it ruled their life to some degree, their behaviors and maybe organized around it or caused a big problem for someone else. [¶] And it's important that a person can have sexually unusual thoughts and fantasies, but we might find them kinky or disgusting. But if they don't cause a problem, they don't rule the person's life and they don't cause a problem with the person or themselves, we don't call it a paraphilia. We don't call it a disorder." Examples, he said, were voyeurism, pedophilia (unusual interest in prepubescent adolescents), and extremely rare instances of interests in

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anybody that you haven't conducted an evaluation of, so I can't do diagnostic stuff." Asked, "So you're not making any type of diagnosis for Mr. Hill?" he replied, "No."

urination or defecation. While each was a possibility, he could not diagnose them in Hill, and felt, "[N]o way could anyone make this kind of diagnosis with the information that's available."

Indeed, Fricke did not see Hill as motivated by any sort of sexual interest. He could not rule out such a motivation, but could not come to a "definitive diagnosis" based on the information he had. Such a diagnosis would require "other data," like magazines or computer images from his residence, or Hill's own admission—something beyond what Hill did in this case. There were many other possible motivations for his behavior, and the "best fit explanation," he felt, was immaturity—likened to a visual manifestation of "bathroom talk" deemed funny to a "latency-age child" between five and ten years old. Fricke regarded Hill as extremely immature, "adolescent" and "not very slick," yet honest in explaining what he did.

Fricke saw possible sexual deviancy in such things as the risk-taking involved in the behavior, the urination or defecation, the number of images, sharing them with others, the age range of the subjects, the surreptitious recording, the hiding of the camera, and the deletion of sexually oriented text messages afterward, but gave them little weight in the circumstances. Hill admitted interest in boys between 16 and 18, but Fricke regarded this as "pretty" normal, noting that Hill said "that's not what he thinks about" and identified his actual sexual partners (like the current boyfriend) as adults. The only DSM-IV diagnosis Fricke offered was a current "adjustment reaction with . . . extreme anxiety," a situational and temporary result of being caught doing something he knew was wrong.

As Fricke understood it: "[I]t kind of started off a bunch of gay guys were sitting around a bar having a good time and somebody passed around a . . . cell phone with a video clip of a man urinating with earphones in his head[,] as he described it[,] rocking out. And there were a bunch of men sitting around this table laughing and drinking, and they passed the thing around and everybody was laughing about how funny this looked. [¶] As I get it, sometime after that Mr. Hill began taking these images." As Fricke understood it, the initial video was taken by someone other than Hill. Fricke agreed with

the mental evaluation by Berg, who termed it a "funny lark." Fricke likened it to "a college boy who moons a female from the car with a bunch of buddies. It could be something very bad or it could be something they all thought was a big heehaw and they got caught." Fricke said, "It's hard for me to imagine that a real professional who knows his stuff would find and testify that he had this diagnosis of . . . a paraphilia."

Hill did not testify, and to the extent that his explanations for his conduct came in through the testimony of Fricke, instructions forbade use of his statements except as a basis for Fricke's conclusions.[3]

II. DISCUSSION

A. *Admission of Missett's Testimony on Paraphilia*

Hill contends that the court violated his due process and fair trial rights by admitting opinion testimony from psychiatrist Missett that his "behavior in this case was consistent with" paraphilia. Hill calls it improper character evidence, and the ranging nature of his briefing suggests that he might be faulting, not just the court's in limine ruling on the subject, but the later questioning of Missett. We start with the in limine ruling, which followed an Evidence Code section 402 hearing at which Missett testified about his qualifications and proposed testimony.

"California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*Id.*, subd. (a).)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) "Generally, an expert may render opinion testimony on the basis of facts given 'in

[3] Instructions advised: "Dr. Alfred Fricke testified in reaching his conclusions as an expert witness [that] he considered a statement . . . made by David Hill, by Dr. Joanna Berg and by Mr. Hill's boyfriend whose name was not revealed. [¶] You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in those statements is true."

a hypothetical question that asks the expert to assume their truth.' [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]" (*Id*. at p. 618.) We review all components of admissibility rulings of this sort for abuse of discretion. (*Id*. at p. 619; *People v. Smith* (2003) 30 Cal.4th 581, 627; *People v. Chavez* (1985) 39 Cal.3d 823, 828; *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1083-1084.)

Hill does not dispute Missett's qualifications, that the subject of paraphilia was sufficiently beyond common experience that it would assist the jury, or that hypotheticals posed to Missett were rooted in facts shown by the evidence. What he argues is that the hypothetical facts *were too closely related to the case*, thus making it appear to the jury that Missett was rendering opinions or diagnoses of himself.

We find no such error. The court indicated in its limine ruling that Missett could testify to consistency or inconsistency based on hypothetical questions, but not as to Hill himself, and instructed in part, from CALCRIM No. 332: "An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to *assume* certain facts are true and to give an opinion based on the *assumed* facts. [¶] It is up to you to decide whether an *assumed* fact has been proved. If you decide that an *assumed* fact is not true, consider the expert's reliance on that fact in evaluating the expert's opinion." (Italics added.) Given this record, we see no error in the court's handling of the matter. Also, Misset himself explicitly stressed for the jury on cross-examination that he had not seen or interviewed Hill and was not giving any diagnosis as to him. (Fn. 2, *ante*.)

Hill's reliance on *People v. Davis* (2009) 46 Cal.4th 539 (*Davis*) and *People v. McFarland* (2000) 78 Cal.App.4th 489 (*McFarland*) is misplaced. In *Davis*, an expert testified about paraphilia as an explanation of the defendant's motive, and the high court examined *McFarland* this way. "At issue in *McFarland* was whether the defendant, who twice previously had been convicted of lewd conduct with a child under 14 years of age, had an unnatural or abnormal sexual interest in children, for purposes of section 647.6 (annoying or molesting a minor), when he stroked a four-year-old girl's arm and face. A psychiatrist called by the prosecution who had not examined the defendant testified,

based on court documents and psychiatric reports from the defendant's prior convictions, that the defendant had such an interest. [Citation.] [¶] The Court of Appeal . . . concluded that the psychiatrist's testimony was inadmissible and reversed. A prosecutor, it held, may not present an *expert's opinion* about a defendant's predisposition to commit sexual offenses unless the defendant places his character regarding such matters at issue, as such evidence constitutes inadmissible character evidence. [Citations.] The court noted that Evidence Code section 1101, which allows the introduction of prior criminal acts in certain circumstances, and 1108, which allows propensity evidence to be used in certain sexual offense cases, only permit the prosecution to present evidence of specific acts, not expert testimony. [Citation] The court also held that the admission of the expert's opinion of the defendant's propensity to commit sexual offenses also 'violated Penal Code section 29, which prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he committed the offense.' [Citation.]" (*Davis*, *supra*, 46 Cal.4th at pp. 604-605.)

Davis continued, without criticism of *McFarland*: "Here, the prosecution's expert, Dr. Park Elliott Dietz, defined the sexual disorder known as paraphilia, and he described the characteristics typical of persons who have those disorders. [Citation.] Although he did not give a medical opinion or diagnosis that defendant was a paraphiliac, he testified that certain of defendant's prior crimes, in which he used weapons and prepared bindings for use on lone female victims, were 'consistent' with the stages of a sexual assault by a paraphiliac, and that defendant's statement that he fantasized about tied-up crime victims while masturbating indicated that he was a paraphiliac. He also testified that defendant's behavior in the kidnapping and murder of Polly was 'consistent' with paraphilia. Defendant argues that under the reasoning of [*McFarland*], the trial court should have excluded this testimony." (*Davis*, *supra*, 46 Cal.4th at p. 605.)

Davis held: "The trial court properly allowed Dr. Dietz to give a general description of paraphilia and the behavior typical of persons who have the disorder. Expert testimony of this nature 'is admissible on any subject "sufficiently beyond

common experience that the opinion of an expert would assist the trier of fact." ' [Citations.] [¶] It is a closer question whether the trial court erred when it permitted Dr. Dietz to testify that when defendant committed his prior assaults and when he kidnapped and murdered Polly, his behavior was 'consistent' with paraphilia. But even if the court should have excluded this testimony, the error was harmless under any standard." (*Davis*, *supra*, 46 Cal.4th at p. 605.)

Davis, of course, confirms the admissibility of expert testimony about paraphilia generally as showing possible intent in a case such as ours, but what most immediately distinguishes *Davis* and *McFarland* from our case is that the expert here did not purport to diagnose Hill as a paraphiliac, or to label his actions or statements, as opposed to *hypothetical* facts, consistent with paraphilia. Thus neither *Davis* nor *McFarland* assists Hill in showing error in admitting Missett's testimony. To the extent that Hill means to fault the prosecutor's manner of questioning Missett, he fails to brief the distinct issue of prosecutorial misconduct, or to identify any objection below or ruling on that ground.

Error is not shown.

B. *Admission of Other Video Clips*

The court held an in limine hearing on competing motions by the People to admit all 32 video clips under Evidence Code sections 1101, subdivision (b), and 1108, and the defense to exclude them all. Some argument centered on the child pornography count on which Hill was ultimately acquitted (fn. 1, *ante*), but as relevant to the count of annoying or molesting a child (§ 647.6), the court found that the other clips were admissible to show motive, intent, and lack of mistake (Evid. Code, § 1101, subd. (b), and that their probative value was not outweighed by a risk of undue prejudice (*id.*, § 352). To further lessen such prejudice, the court, while allowing mention that there were 32 videos in all, allowed into evidence only six beyond the one underlying the charge. It also gave a tailored limiting instruction, not challenged here, on the proper use of the evidence.[4]

[4] "The People presented evidence of other behavior by the defendant that was not charged in this case that the defendant videorecorded other individuals engaged in the act of urination and or sitting on a commode in separate video files. [¶] You may consider

"Generally, the prosecution may not use a defendant's prior criminal act as evidence of a disposition to commit a charged criminal act. (Evid. Code, § 1101, subd. (a).) But evidence is admissible 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge[, absence of mistake or accident] . . .) other than his or her disposition to commit such an act.' (Evid. Code, § 1101, subd. (b).)

" 'To be admissible to show intent, "the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance." ' [Citations.] . . .

"Because evidence of other crimes may be highly inflammatory, the admission of such evidence ' " 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.' " ' [Citation.] Under Evidence Code section 352, the probative value of the defendant's prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations] 'We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of

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this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the acts. Proof by a preponderance of the evidence is a different burden of proof than 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, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] 1. The defendant was motivated by an unnatural or abnormal sexual interest in the child as charged in count 2. [¶] 2. The defendant's motive in videotaping John Doe was for sexual stimulation or gratification only as it relates to count 2. [¶] 3. The defendant's actions in videotaping John Doe were the result of mistake or accident. [¶] Do not consider this evidence for any other purpose except for the limited purpose of determining defendant's intent and/or motive in videotaping John Doe. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the acts, 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 count 2 (Penal Code section 647.6). The People must still prove the charge beyond a reasonable doubt."

evidence under Evidence Code sections 1101 and 352.' [Citation.]" (*Davis, supra*, 46 Cal.4th at p. 602.)

Hill argues that the other video clips, while relevant to a possible claim of mistake or accident, should not have been admitted on that basis because, as he points out, his trial counsel stated at argument on the in limine motion: "There's not going to be any contention that this was an accident, that it was a mistake to videotape the person who was urinating." However, even assuming this was a sufficient offer to stipulate as much, we see no abuse of discretion. The general rule is that the prosecution cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness (*People v. Scheid* (1997) 16 Cal.4th 1, 17, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 132), and the other video clips were highly probative to show an unnatural or abnormal sexual interest rather than a lark, undertaken for humor's sake. We disagree with Hill's bare assertion that the clips were "nothing more than prohibited character evidence" having "no relevance to any issue in dispute . . . ." His claim of a lark, rather than an unnatural or abnormal sexual interest, might have been plausible if it only occurred once, but not if this was the 32nd time, involving 25 young males in virtually identical circumstances. " ' "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . ." [Citations.] . . . ." ' " (*People v. Kelly* (2007) 42 Cal.4th 763, 783.) Hill never offered to stipulate to that element (*People v. Lindberg* (2008) 45 Cal.4th 1, 23), and if the additional basis of refuting mistake or accident was not truly at issue, then Hill was not harmed by it.

Similarly, Hill criticizes the use instruction's inclusion of showing a "sexual stimulation or gratification" motive as a permitted use (fn. 4, *ante*), noting that this is not an essential element. The inclusion, however, could only have helped Hill if construed by the jury as somehow adding a further, required state of mind. Of course, having a

motive of sexual stimulation or gratification, on the facts presented, surely satisfies the unnatural-or-abnormal-sexual-interest element anyway.

Nor do we see abuse of discretion in the trial court's weighing of probative value against undue prejudice. "Evidence is not 'unduly prejudicial' under the Evidence Code merely because it strongly implicates a defendant and casts him or her in a bad light, or merely because the defendant contests that evidence and points to allegedly contrary evidence. Instead, undue prejudice is that which 'uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.' [Citations.]" (*People v. Robinson* (2005) 37 Cal.4th 592, 632, fn. omitted.) The six other clips used in testimony took little trial time and were no more inflammatory than the charged conduct.

There is also no support in the record for Hill's assumption that the evidence was misused to show bad character. The court's limiting instruction clearly prohibited that use (fn. 4, *ante*). "The presumption is that limiting instructions are followed by the jury. [Citation.] That presumption is not rebutted here." (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

Finally, Hill complains in a separate part of his briefing that the prosecutor "never argued that Dr. Missett's testimony was admissible to prove motive or intent," apparently meaning that it was never argued to the jury. This is legally irrelevant, for "whether evidence was erroneously admitted does not depend on counsel's later argument to the jury." (*People v. Harrison* (2005) 35 Cal.4th 208, 230, fn. omitted.)

No abuse of discretion is shown.

C. *Sufficiency of the Evidence*

Hill raises three challenges to the evidence supporting his conviction for annoying or molesting a child. (§ 647.6, subd. (a)(1).) "The test on appeal for determining if substantial evidence supports a conviction is whether ' "a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." ' [Citations.] In making this determination, we ' "must view the evidence in a light most favorable to respondent and presume in support of the judgment

the existence of every fact the trier could reasonably deduce from the evidence." ' [Citation.]" (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Substantial evidence must exist as to each essential element of the offense. (*People v. Frye* (1998) 18 Cal.4th 894, 953.)

1. Minority age. One essential element is that the victim be under 18 years old. (§ 647.6, subd. (a)(1).) Undisputed testimony from Doe was that he was born in August 1991. Thus he was 15 years old at the time of the offense in March 2007, but case law has long held that an actual and reasonable belief that the child is 18 or older is a valid defense to the crime (*People v. Atchison* (1978) 22 Cal.3d 181, 182-183 [applying the defense to predecessor statute, former § 647a]). The jury was instructed (CALCRIM No. 1122): "The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe the child was at least 18 years of age."

Hill's first challenge goes to whether the People met that burden. He claims that no substantial evidence supports an inference *that he knew Doe was under 18 years old*. He stresses that there were some 18-year-old seniors at the school, that the video of Doe was just two seconds long, and that no evidence showed whether he saw Doe before starting the video, only that he may have heard Doe talking to someone on a cell phone. The People point to testimony that Hill had videotaped minors before and that, of the 18-year-olds at the school, many would have had short days and been off campus by the noon hour. Hill argues that no videos of minors were proven, since Fricke's lay opinion about the age range of males in the 32 video files he watched did not connect any under-age victims to particular videos shown to the jury.

We initially question Hill's framing of the issue as whether there is sufficient evidence *that he knew Doe was 18 years old*. Nevertheless, since the issue is unbriefed, we proceed for argument's sake using Hill's formulation,[5] and find sufficient evidence

[5] CALCRIM No. 1122 instructed that, to overcome the mistake-of-age defense, the People had to prove that Hill "did not actually and reasonably believe the child was at least 18 years of age." Testing whether substantial evidence shows that Hill *believed Doe was under age 18* (Hill's formulation) is not the same as testing whether substantial evidence shows that he *did not believe Doe was 18 or older* (the instruction's formulation), and the difference is more than semantic. Casting the issue in the

that he knew Doe was not yet 18 years old. To start, while there is no direct evidence on the point, the jury could reasonably infer that Hill did see Doe nearing or entering the stall next to his. Common experience would tell jurors that bathroom stall doors often do not fit closely enough to completely block a view out, even with a door shut. Or, jurors could reasonably infer that Hill had the door slightly ajar or used a camera viewfinder to see Doe. Fricke's lay opinion that the videos he reviewed were of males who appeared to be no more than 21 is enough to support an inference that Hill was selective as to age, and the jury knew there were teachers and visitors, like Hill, were beyond that age range. The jury could reasonably infer that Hill saw Doe before filming him.

Given that inference, we resolve the issue of whether Hill actually and reasonably believed Doe was under age 18 on a basis overlooked in the briefing. At the March 2009 trial, Doe was a 17-year-old high school junior, five months shy of his 18th birthday. Jurors saw him during this testimony, and surely gained an impression of whether he appeared to be his age. They also knew from the instructions that the question for them was how he reasonably appeared two years earlier, in March 2007.

Our appeal record does not reflect how old Doe looked while testifying, [6] and we therefore need go no further in our search for substantial evidence. "What the trier of fact

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instruction's terms, rather than Hill's, would allow us to regard much of the testimonial uncertainty Hill highlights as logically *supporting* that he *did not have a basis to reasonably believe* Doe was 18 or older. By casting the question in the instruction's terms rather than Hill's, we also effectively ask whether substantial evidence supports a *negative* finding—i.e., that Hill "did *not* actually and reasonably believe" Doe was 18 or older. This arguably sets the bar higher for Hill than he supposes, for the task of testing a negative finding for substantial evidence has been equated with testing whether the opposite proposition—here, that Hill *did* so believe—is compelled by the record as a matter of law. (*Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1099 [challenge to a finding that the defendant did *not* exercise due care was tantamount to claiming that he did, as a matter of law, exercise due care].)

[6] Defense counsel said in closing argument to the jury: "Mr. Doe was fairly mature both in his presentation in court and in the picture of him in the video. He does not look like a child." Jurors were not bound by that argument and were instructed (CALCRIM No. 104): "You must decide what the facts are in this case. . . . [¶] Nothing

observes is itself evidence which may be used alone or with other evidence to support the judgment. [Citation.] When what the trier of fact observed has not been made a part of the transcript on appeal, a reviewing court must assume that the evidence acquired by such a viewing is sufficient to sustain the finding or judgment in question. [Citation.] Furthermore, when there is a conflict between such evidence and other evidence, it is presumed that the trier of fact resolved the conflict by accepting the demonstrative evidence as being more credible, and this determination is binding on a reviewing court. [Citations.]" (*People v. Buttles* (1990) 223 Cal.App.3d 1631, 1639-1640.)

We must, and do, presume that the jury found during his testimony that Doe did not look significantly older than his stated age of 17, and logically reasoned that he would have appeared to be considerably younger two years earlier. Substantial evidence thus supports implicit rejection of the mistake-of-age defense.

2. Unnatural or abnormal sexual interest. Jurors were instructed that the Hill's conduct had to be "motivated by an unnatural or abnormal sexual interest in the child" (CALCRIM No. 1122). Hill attacks that element as unsupported, stressing that no evidence shows that he "was sexually aroused when confronted," and that neither expert "established a sexual motivation" for his actions.

There is ample support for the required finding. The jury did not have to conclude that Hill was motivated by a paraphilia or a sexual interest in boys generally, only an unnatural or abnormal sexual interest in this particular child (*People v. Shaw* (2009) 177 Cal.App.4th 92, 102-104), and both experts agreed that one can have an abnormal sexual interest that has not ripened, by time or effect, into a paraphilia. The fact that defense expert Fricke, having examined Hill, could not diagnose an abnormal sexual interest and thought the "best fit" was an immature sense of humor, was not binding on the jury, and even Fricke conceded that he could *not rule* out a sexual interest as Hill's motivation. Fricke's view that a sexual interest in boys between 16 and 18 years old was

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that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence."

"pretty" normal, moreover, did not cover a 15-year-old like Doe. Finally, as the People note, it has been held that a sexual interest in a child under age 18 may be inherently abnormal when it motivates conduct directed at that child. (*Nicanor-Romero v. Mukasey* (9th Cir. 2008) 523 F.3d 992, 1001.) That is certainly true when the child is only 15 years old. Substantial evidence supports the element.

3. "Intent to be observed." In supplemental briefing based on *People v. Phillips* (2010) 188 Cal.App.4th 1383 (rev. den. Jan. 19, 2011) (*Phillips*), a case decided after the usual appeal briefing, Hill claims insufficient evidence of a necessary "intent to be observed," noting that the evidence showed him filming surreptitiously, and thus with an intent *not* to be observed. The People argue that *Phillips* does not stand for the proposition that intent to be observed is a necessary element of the offense.

Phillips posed odd facts and an odd contention. The defendant (Phillips) was convicted of annoying or molesting a child for sitting masturbating behind the wheel of a car parked in front of a high school, near dismissal time, where his masturbating was seen by a 15-year-old girl leaving the school who glanced into his car as she passed by on the sidewalk. (*Phillips*, *supra*, 188 Cal.App.4th at pp. 1386-1387.) Relying on cases that had articulated a requirement that sexually motivated conduct be directed at a *child* (in the singular), Phillips argued that the evidence failed to show, and CALCRIM No. 1122 failed to convey, a requirement that he intended for some particular child to see him. He also contended that it was not enough, as one could infer from the circumstances, that he knew he likely would be seen by children. (*Id*. at p. 1388.) The Court of Appeal (Second Dist., Div. Seven) rejected the argument, after examining the history of section 647.6, subdivision (a)(1), and its predecessor statute, former section 647a. (*Ibid*.)

Phillips first concluded that case references to a *child* victim, in the singular, were due to the fact that those cases tended to involve typical situations where a perpetrator did focus on a particular child, but that reading such language as a limitation or the statute's reach was at odds with the statute's purpose to protect *children generally* from sexual predators. (*Id*. at pp. 1389-1394; cf. *People v. Lopez* (1998) 19 Cal.4th 282, 289-290.) The court therefore held that the statute reached conduct directed at *either* a child or

children, and it initially formulated its holding this way: "[S]ection 647.6, subdivision (a)(1) is violated when a defendant engages in the requisite annoying or offensive conduct, motivated by an unnatural or abnormal sexual interest in a specific child or children generally, with the intent that the conduct be observed by a child or children. This result is consistent with the language of the statute, existing case law and CALCRIM No. 1122, which was properly given in this case." (*Phillips*, *supra*, at p. 1388.)

The conundrum that *Phillips*'s initial formulation poses for us is its inclusion of the phrase, "with the intent that the conduct be observed by a child or children." Hill sees this is a newly declared *essential element* of the offense. For several reasons, we do not. First, if *Phillips* meant to hold that an intent to be observed was an essential element, this would be inconsistent with its further holding that CALCRIM No. 1122, *which does not include in its definition an intent to be observed* (see pt. II.D., *infra*) and was not apparently not so modified in *Phillips*, was correctly given.

Second, and despite intervening discussion of an intent to be observed, that "element" appears nowhere in *Phillips*'s final formulation of the holding: "[I]n sum, a violation of Penal Code 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. Lopez*, *supra*, 19 Cal.4th at pp. 286, 291; *People v. Shaw*, *supra*, 177 Cal.App.4th at pp. 102-104.) This interpretation of the statute is consistent with the language of Penal Code section 647.6, subdivision (a)(1) and its underlying purpose—'protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter.' " (*Phillips*, *supra*, 188 Cal.App.4th at p. 1396, fn. omitted.)

Third, because the jury in *Phillips* was *not* instructed that it had to find an intent to be observed, it is doubtful that the court meant to elevate "intent to be observed" to the

status of an essential element. The following language (italics added) is instructive: "Phillips's conduct in masturbating in his car while parked at a curb directly in front of a high school, on a school day, at school dismissal time, is not simply an act of voyeur, or indiscreet gesture, or sexual indiscretion . . . . The evidence presented at trial supported the *reasonable inference the jury reached* as indicated by the verdict, that Phillips was engaged in objectively annoying and irritating conduct, that he was motivated by an unnatural or abnormal sexual interest in children, that he directed his conduct towards children, *intending to be observed by some child* and that he was in fact observed by [a child]. This evidence is sufficient . . . notwithstanding the fact there was no evidence the victim was known in advance to Phillips or she was the specific target of Phillips's offensive conduct." (*Phillips*, *supra*, 188 Cal.App.4th at p. 1397.) If *Phillips* meant to render "intent to be observed" an express element in every case, when the jury there had no such instruction, there was no logical way of *inferring* that the jury necessarily resolved the question against Phillips. Rather, it seems that the court was saying that the actus reus of *directing conduct at* a child adequately informs the jury of any implicit mental state.

A fair reading of *Phillips* is that, on the facts of most cases, an intent to be observed is *implicit* in instruction that the offensive conduct must be "directed at" one or more children (CALCRIM No. 1122). This interpretation is borne out by this extended passage from *Phillips* that begins by saying an intent to be observed is "subsumed in" the directed-at element of the offense: "[T]here must be evidence that the perpetrator 'directed' the conduct toward a child. (See *People v. Lopez*, *supra*, 19 Cal.4th at p. 289; CALCRIM No. 1122.) The intent to be observed while engaging in the offensive conduct is subsumed in the element that the offender 'directs' his conduct toward a child.

"Indeed it is the 'intent to be observed' that, in our view, distinguishes this offense from other conduct that Penal Code section 647.6, subdivision (a) does not criminalize. Compare, for example, two actors engaged in the same conduct harboring different intentions. First—consider the person who engages in the conduct proscribed by [the section], motivated by the unnatural sexual interest in children, and who directs that

conduct toward some child or children with the intent to be observed by any child. Clearly this first person has violated [the section]. The intent to be observed by some child gives rise to the inference that the actor is a sexual predator—thus, criminalizing the conduct serves the underlying purpose of the statute to protect children from sexual predators.

"Second, in contrast—consider the person who engages in the same annoying conduct, motivated by the same unnatural interest, and who *does not intend* to be observed by any child, but instead merely intends to watch a child or children while engaging in the offensive conduct (i.e., is a voyeur). The fact that this person is observed by some child anyway, by accident, does not convert the conduct into a violation of Penal Code section 647.6, subdivision (a). This person in this latter example—this 'voyeur'—may be accused of a number of things, including bad timing, poor judgment and perhaps the violation of other laws, but the voyeur in this example is not necessarily a sexual predator. Thus, criminalizing the voyeur's conduct under section 647.6 does not serve the underlying purpose of the statute.

"This distinction between the sexual predator described in the first example and the voyeur described in the second is determined according to proof of intent. The criminal intent may be easily proved if the child victim is a specific child, known in advance to the offender. . . . Intent is more difficult to prove in a case like this one, however, where it appears that Phillips did not preselect any particular child to observe his conduct. In this case, the requisite intent is proved from the circumstantial evidence surrounding Phillip's conduct, such as the kind of vehicle in which he was parked, where he parked in relation to the children, the time of day—the degree to which his actions rise to the reasonable inference that he intended to be observed." (*Phillips*, *supra*, 188 Cal.App.4th at pp. l394-1395, fn. omitted.) Focusing on intent to be observed, the court reasoned in footnote, answered a hypothetical in which, Phillips suggested, one might be guilty under the statute by being seen by a child while masturbating and watching child pornography in the privacy of his or her home. "As our analysis in the text makes clear, to extent the defendant in Phillips's hypothetical has not directed his

conduct towards a child because he lacks the intent to be observed, then the defendant has not violated section 647.6, subdivision (a), even if he is observed by accident. In addition, the situation in this case is very different than Phillips's hypothetical. Phillips's conduct was not done in private; he was not parked in a secluded area where it would be unlikely a child might observe him. On the contrary, he was parked in an area during a time of the day when it was highly likely that he would be observed by a child or multiple children." (*Phillips*, *supra*, 188 Cal.App.4th at p. 1395, fn. 10.)

That attempt to clearly delineate voyeurs from predators repeatedly poses the question not as an *actual* intent to be observed, but as a *likelihood* of being observed. When coupled with *Phillips*'s reasoning that an adequate such intent is easily proved in cases where a defendant has focused his or her actions on a particular, known child, and only more difficult where that focus is unclear, *Phillips* appears to be saying that, in the usual case where circumstances readily show a likelihood of being seen by one or more children, nothing more is needed. To the extent that *Phillips* suggests a need for specific evidence or instruction based on an "intent to be observed," it is only in an unusual case where the jury could otherwise have trouble finding the "directed at" element satisfied.

Read in that light, *Phillips* does not assist Hill. Hill focused his conduct on a known child who was urinating in the bathroom stall next to his, and any intent to avoid being caught in the act is of secondary moment. A jury considering the words "directed at," on these facts, would easily appreciate that he was acting *toward* a child. Thus no special evidence or clarifying instruction was needed, and substantial evidence supports the "directed at" element. But even if we read *Phillips* as requiring some high likelihood of *actually being seen* by his victim, Hill ignores that fact that part of the conduct he directed toward Doe with the camera was to *set off a flash* , not far from the eyes of the victim, who stood at the urinal talking on the phone. That flash was highly likely to attract the victim's attention.

No evidentiary deficiency appears.

D. *CALCRIM No. 1122*

The offense of annoying a child (§ 657.6, subd. (a)(1)) was defined for the jury in this language from CALCRIM No. 1122:

"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.

"The defendant is not guilty of this crime if he actually and reasonably believed that the child was at least 18 years of age. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe the child was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime."

1. "Intent to be observed." Hill raises two claims of error. The first is that the instruction failed to include the "element" of intent to be observed, but this collapses on the merits with our previous conclusion (pt. II.C.3., *ante*) that, assuming *Phillips* can be read that way, this was not a case where the facts required instructional clarification.

Hill also fails to clear two procedural hurdles. One is forfeiture, since he never requested such instruction or amendment to CALCRIM No. 1122. "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

The other hurdle is lack of a sua sponte duty. Even if Hill could surmount his failure to request the instruction by persuading us that *Phillips* announced a new *element of the offense* (*People v. Hillhouse*, *supra*, at p. 503 [instructions regarding elements of

the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review, citing § 1259]), *Phillips* is the first case ever to suggest such an element, and has not been decided at the time of Hill's trial. Indeed, the People correctly note that over a half century of case law has deemed this offense to require *no specific intent*. (*In re Sheridan* (1964) 230 Cal.App.2d 365, 372-373 [annoyance or molestation are measured objectively]; accord *People v. Lopez*, *supra*, 19 Cal.4th at pp. 289-290.) Even if *Phillips* had been published at the time of trial, a single intermediate appellate court decision does not necessarily amount to a *general principle of law* upon which a trial court must instruct on its own motion. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 126-127, fn. 4; see generally *People v. Wade* (1959) 53 Cal.2d 322, 334.)

2. Reasonable belief in majority age. Hill's second claim is that the instruction as to knowledge of minority age, by casting the notion as whether a defendant *actually and reasonably believed* the contrary, violates state and federal due process and the right to a fair trial by implicitly shifting the burden of proof to the defendant and failing to convey that "a reasonable doubt may be based on a lack of evidence o[r] a conflict in the evidence."

Hill raised this objection below and proposed a modified instruction that would have ended: "The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that John Doe was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime." But the court adhered to the CALCRIM language: "The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe the child was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime."

No error appears. The defense wording was perhaps more eloquent, but was essentially no different, and the CALCRIM language, while oddly framing the People's burden as proof of a negative, was not likely to have misled the jury into believing the burden was on the defense. Both sentences of the CALCRIM language place the burden

on the People. It is not error to refuse a duplicative instruction. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1079.)

In his reply brief, Hill suggests that the instruction is also flawed for requiring *reasonable*, not just subjective, mistake of age, and that the defense unfairly burdens the defense because it may require the defendant's personal testimony to succeed. We have three answers: first, we need not reach issues improperly raised for the first time in a reply brief (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11); second, Hill cites no pertinent supporting authority to merit serious discussion of this proposition (*People v. Hardy* (1992) 2 Cal.4th 86, 150), which would overturn nearly half a century of case law on the mistake-of-age defense generally (*People v. Hernandez* (1964) 61 Cal.2d 529, 535-536); third, Hill never raised it below, his own proposed modification having *included* the "reasonable" requirement he now decries.

E. *Sex Offender Registration*

Misdemeanor annoying or molesting a child (§ 647.6) is one of the offenses specified in section 290, subdivision (c), for mandatory lifetime sex offender registration. Hill nevertheless moved presentence *not* to impose registration, arguing that doing so would violate his rights to state and federal equal protection of the law, under the analysis of *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*). The People filed opposition, and the court, after hearing argument at the sentencing hearing, ruled without elaboration that registration did not violate Hill's equal protection or due process rights. It ordered the registration.

Hill contends again that he was denied equal protection, asking that we declare the *mandatory* registration invalid and, as was done as a remedy in *Hofsheier*, remand for the consideration whether to impose the registration as a matter of *discretion*.[7] (*Hofsheier*,

[7] Every person convicted of section 647 "shall be required to register" (§ 290, subd. (b) & (c)), whereas section 290.006 provides: "Any person ordered by any court to register . . . for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the

supra, 37 Cal.4th at pp. 1207-1209.) He clarifies in his reply brief that his challenge is facial, not as-applied. We therefore analyze the issue on the abstract elements of the offense, rather than on the particular circumstances of his case. (*People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1375; cf. *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913 [where both challenges are raised, "[w]e undertake the facial review first because if the law is unconstitutional as violating the equal protection clause on its face, and hence incapable of any valid application, there is no need to consider its application to the [person] in question"].)

" 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*Hofsheier*, *supra*, 37 Cal.4th at p. 1199.) "[W]e do not inquire 'whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citations.]" (*Id.* at pp. 1199-1200.) If that prerequisite is met, we test the legislation "to determine if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]" (*Id.* at p. 1200.) Here, we find the similarly-situated test unmet, and, therefore, need not reach the rational-relationship test.

The Supreme Court in *Hofsheier*, *supra*, 37 Cal.4th 1185, tested whether "an adult offender [convicted of] a voluntary sexual act with a minor 16 years or older" (§ 288a, subd. (b)(1)), a group that included the defendant and was subject to mandatory lifetime registration, was similarly situated with "an adult offender convicted of voluntary sexual intercourse with a minor 16 year or older" (§ 261.5), a group that was not subject to the mandatory lifetime registration. (*Id.* at p. 1198.) Examining those groups, the court held: "[B]oth concern sexual conduct with minors. The only difference between the two

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reasons for requiring registration." (*Hofsheier*, *supra*, 37 Cal.4th at p. 1197 [discussing the quoted provision as found in former section 290, subd. (a)(2)(E)].) "In summary, if a defendant is convicted of a crime listed under the mandatory lifetime registration provision [citation], the trial court must impose a registration requirement; under the discretionary provision [citation], it may require lifetime registration if it finds the crime to have a sexual purpose." (*Id.* at p. 1198.)

offenses is the nature of the sexual act. Thus, persons convicted of oral copulation with minors and persons convicted of sexual intercourse with minors 'are sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.' [Citation.]" (*Id.* at p. 1200.)

In urging that *Hofsheier* extends to the situation here, Hill equates himself with those offenders who, as in *Hofsheier*, commit voluntary acts with minors. Noting that an annoy/molest offense could involve acts of oral copulation or intercourse just as "serious" as what we shall call "*Hofsheier* offenses" or, as in this case, acts involving no direct contact, he argues that it would be unconstitutional to require mandatory registration for all annoy/molest offenses, but not for voluntary *Hofsheier* offenses.

Hill's approach of looking for what he deems equally "serious" sexual conduct glosses over the definitional distinctions between annoy/molest and *Hofsheier* offenses. In contrast with the latter: annoy/molest offenses do not require any touching at all, only that the defendant's conduct be directed toward a minor (*People v. Memro* (1995) 11 Cal.4th 786, 871; *People v. Carskaddon* (1957) 49 Cal.2d 423, 426); the terms annoy and molest are treated synonymously (*People v. Lopez*, *supra*, 19 Cal.4th at pp. 289-290), with no need for a touching; the annoy/molest offense focuses, not on a defendant's intent, but on him or her having a *motive* of an unnatural or abnormal sexual interest in the child (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126 [calling the offense a "strange beast" in requiring proof of motive]); and, no doubt partly because the law's protection extends to children of all ages, not just more articulate or less naïve older minors, the offenses make the subjective annoyance of the child irrelevant and test *objectively* whether "a normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct."[8] (CALCRIM No. 1122; *People v. Lopez*, *supra*, 19 Cal.4th at p. 290 ["to determine whether the defendant s

[8] *Hofsheier* did not concern itself with sex offenses in those statutes perpetrated against children *under* the age of 14, for all such offenses *did* require mandatory lifetime registration. (*Hofsheier*, *supra*, 37 Cal.4th at p. 1198.)

conduct would unhesitatingly irritate or disturb a normal person, we employ an *objective test* not dependent on whether the child was in fact irritated or disturbed"].)

Given those elemental distinctions, the misdemeanor offense under section 647.6, subdivision (a), must be read as intended to reach offensive conduct that might otherwise be beyond the reach of other sex offenses. " ' " 'The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]' " ' [Citations.] In recent years, section 290 registration has acquired a second purpose: to notify members of the public of the existence and location of sex offenders so they can take protective measures. [Citation.]" (*Hofscheier*, *supra*, 37 Cal.4th at p. 1196.) Hill is therefore not similarly situated to *Hofscheier*-type offenders, and we cannot second-guess the Legislature's decision to deem such offenses to be as serious, for registration purposes, as *Hofscheier* offenses. The fact that the Legislature has opted to give the annoy-molest offenses misdemeanor status may well be that, in some cases, the conduct is deemed unworthy of felony punishment, but the decision to require mandatory lifetime registration is not a denial of equal protection, or due process, for such offenders.

III. CONCLUSION

The judgment is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.